

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-7330

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-7330

BAY POINT CORP.,

Plaintiff-Appellant,

against

REPUBLIC NATIONAL BANK OF NEW YORK,

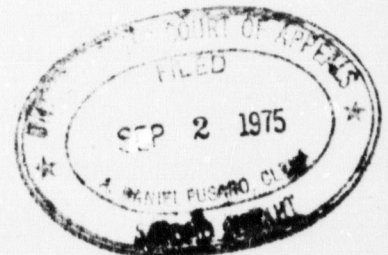
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

JOINT APPENDIX

PATTERSON, BELKNAP & WEBB
Attorneys for Plaintiff-Appellant
30 Rockefeller Plaza
New York, New York 10020

HERMAN E. COOPER, ESQ.
Attorney for Defendant-Appellee
500 Fifth Avenue
New York, New York 10036



PAGINATION AS IN ORIGINAL COPY

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CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

111 JUDGE BRIEANT

73 CIV. 2549

D. C. Form No. 108 (Rev.)

TITLE OF CASE

ATTORNEYS

RAY FINE

For plaintiff:

Patterson, Balknap & Webb
30 Rockefeller Plaza, NYC

VS.

REPUBLIC NATIONAL BANK OF NEW YORK

49A

For defendant:

HERMAN S. COOPER
500 FIFTH AVE.
NEW YORK, N.Y. 10036
354-1520

TRANSFERRED FROM THE U.S. DIST. COURT FOR THE DISTRICT
OF NEW JERSEY. THIR NO. 73- 592 FEES PAID
THERE

STATISTICAL RECORD

COSTS

DATE

NAME OR
RECEIPT NO.

REC.

DISB.

J.S. 5 mailed X

Clerk

J.S. 6 mailed ✓

Mar-shal

Basis of Action:

Docket fee

BREACH OF MOUTH OR CONTRACT.

Witness fees

Action arose at:

Depositions

Trans
Spill Kirby
5/2/75

5-

5-

BAY POINT CORP. VS. REPUBLIC NA TONAL BANK OF N.Y.

IV

JUDGE

78 CIV. 254

DATE	PROCEEDINGS	Date Order of Judgment Not
Jun 8-73	Filed papers originally filed in U.S. Dist. Court for New Jersey were this date FILED, COMPLAINT. CHECKED SHEET AFFID VITO ETC. MAILED RULES 381 RECORD OF PROCEEDINGS IN U.S.D.C. S.D.N.Y.	
Jun 11-73	Filed deft's notice to take deposition of the plttf. on 6/28/73.	
Jun 11-73	Filed Deft's ANSWER to the complaint.	HEC
Jul 2-73	Filed deft's amended ANSWER to the complaint	HEC
eb. 11-74	Filed stip. & order that the attached supplemental pleading be entered and deft. acknowledges service upon it as of 2-11-74--Brieant, J.	
eb. 27-74	Filed deft's ANSWER and counterclaim to plttf's supplemental complaint	HEC
Mar. 30-74	<i>Plt - Court Confused Full</i>	
Mar. 14-74	Filed order granting stay pending a determination by the Superior Court of the State of N.J. fixing & determining the amount due, if any--ordered that this action is transferred to the Suspense Docket of this Court--Brieant, J.	
Mar. 13-74	Filed plttf's ANSWER to counterclaim	
Apr. 12-74	Filed deposition of Hirsch.	
May 19-74	Filed Deft's Notice of Motion & Affirmation to restore the within action from the Suspense Docket.	
May 25-74	Filed Plttf's affdvt in opposition to defts motion to restore this case to the docket.	
Dec 3-74	Filed Deft's reply affdvt.	
Dec 3-74	Filed Memo-End on back of motion filed 11-19-74...The action is transferred from the Suspense Docket of this Court to my docket as an active case, and the stay of proceedings made on consent by order dtd. 3-13-74 is vacated ..Discovery shall be resumed and shall be conducted with diligence.....If the parties cannot agree on dates for discovery, further application shall be made to me by Order to Show Cause...So much of hte motion which seeks to restrain proceedings in the Mortgage foreclosure action abovementioned is denied.So Ordered..Brieant, J. m/n	
Jan. 2-75	Filed by deft affirmation & notice of motion to stay plttf, pendent lite from proceeding in foreclosure action. Ret. 1-9-75.	
Jan 9-75	Filed Reply Affirmation off Herman E. Copper dated 1-8-75. (to move)	
Jan 9-75	Filed Affidavit of Robert Schaul dated 1-7-75. (to move)	
Jan 9-75	Filed Memo-End on back of Motion filed 1-2-75....Stay of proceedings granted as directed on transcript in open Court this date. In all other respects the motion is denied without prejudice to renew when pre-trial order is entered. Settle order on Notice granting a stay. Brieant, J. m/n	
Jan 30-75	Filed Order - deft's motion be granted in part by stay of proceedings before the Superior Court of State of N.J. Ocean County as to the issue of the validity of the certain mortgage of which the plttf. herein is the mortgagor and the deft is the holder by assignment,and that this action be marked perferred on the Civil Calendar of this Court.....and that the deft's motion be otherwise denied without prejudice to renew upon entry of a pretrial order herein, and that the within stay shall not operate to preclude the Superior Court of the State of N.J., Ocean County from adjudicating with finality other issues between parties..and that the plttf. directly, indirectly or through its servants, ...be stayed from proceeding before the Superior Court of the State of N.Y. for any relief which might result in an adjudication by said Court of the issues now before this Court in the within Action...dated 1-29-75 issued at 1:40PM...Brieant, J. m/n	
Jan 4-75	<i>Pre-trial Conference Hearing began, lasted & concluded.</i>	
Jan 29-75	PRE-TRIAL/CONFERENCE HELD BY <i>May Schiiber</i>	
eb 18-75	Filed Plttf's Notice of Motion for an Order dissolving the restraints.... ...ret. 2-28-75..at 9:30AM.	
eb 25-75	Filed Deft.'s Notice of Motion for an Order pur. to FR Civ P 65 and 70....ret. 2-28-75....at 9:30AM Rm 706.	

BAY POINT CORP.

VS

REPUBLIC NATIONAL BANK OF N.W.

730 2549CLB

CIVIL DOCKET

DATE	FILINGS-PROCEEDINGS	CLERK'S FILES		AMOUNT REPORTED IN EMOLUMENT RETURNS
		PLAINTIFF	DEFENDANT	
Feb 27-75	Filed Pltff's Affdvt. in support of motion to reconsider restraining order and in opposition to deft's motion for contempt.			
Feb 28-75	Filed Pltff's Memo. in support of its motion to vacate the order of 1-29-75.			
Mar 3-75	Filed transcript of record of proceedings, dated <i>January 9, 1975</i>			
Mar 28-75	Filed plttffs affdvt & Show Cause Order for a voluntary discontinuance without prejudice. Ret. 4-3-75.			
3-28-75	Filed In Court..Letter from Kerby, Cooper, Schaul & Garvin to Judge Brieant, dated 3-27-75.			
4-2-75	Filed Affdvt. by H.E. Cooper atty for deft in ipposition to plttff's belated motion for an unconditional vol. Dismissal.			
3-30-75	PRE-TRIAL CONFERENCE HELD BY <i>Schuyler May</i>			
3-11-75	PRE-TRIAL CONFERENCE HELD BY <i>May Schuyler</i>			
3-11-75	PRE-TRIAL CONFERENCE HELD BY <i>May Schuyler</i>			
3-25-75	PRE-TRIAL CONFERENCE HELD BY <i>May Schuyler</i>			
4-23-75	Filed transcript of record of proceedings, dated <i>2-28-75</i>			
Apr. 28-75	Filed Order that stay contained in an Order of this Court dated Jan. 29, 1975, & made pursuant to 28 U.S.C. §2283, be & the same is hereby is in all respects, terminated & vacated.... BRIEANT, J			
4-29-75	Filed Memo of Law on behalf of the State of N.J.			
4-29-75	Filed Deft's Affidavit in opposition to plttff's motion to dissolve the Resttaining Order.			
4-29-75	Filed Memo-End on back of motion filed 2-25-75....Motion denied, The within Action is dismissed with prej. and w/o costs for failure to give discovery and failure to prosecute. The Counterclaim is dismissed w/o prej. See Transcript of hearing this date....So Ordered.....brieant, J. mn			
4-29-75	Filed Memo end on back of OSC dated 3-28-75....Motion Denied. So Ordered. Brieant, J. mn			
5-7-75	Filed Transcript dated 4-28-75.			
5-13-75	Filed Letter from J.E. Cooper dated 3-12-75 to Judge Brieant.			
5-28-75	Filed Pltff's Notice of Appeal to USCA from final judg. ent 4-28-75.....copy of notice mailed on 5-29-75 to: Herman E. Copper-500 5th ave. NYC.			
5-11-75	Filed Transcript of record of proceedings, dated <i>4-24-75</i>			
5-11-75	Filed Transcript of record of proceedings, dated <i>4-28-75</i>			

ORIGINAL FILED
APR 30 1973 A-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL NO.

BAY POINT CORP.,

Plaintiff,

-vs-

REPUBLIC NATIONAL
BANK OF NEW YORK,

Defendant.

COMPLAINT

JURISDICTION

1. Plaintiff, BAY POINT CORP., is a corporation organized and existing under the laws of the State of New Jersey, having a principal place of business at 9 De Forest Avenue, Summit, New Jersey, 07901.

2. Defendant, REPUBLIC NATIONAL BANK OF NEW YORK, is a National Banking Association, located in the State of New York with a place of business at Fifth Avenue at 40th Street, New York, New York, 10018.

3. Jurisdiction is founded upon 28 U.S.C. § 1332.

4. The amount in controversy, exclusive of interest and costs, exceeds \$10,000.

FIRST COUNT

1. Plaintiff is the owner of certain real estate located in Berkeley Township, Ocean County, New Jersey, which property (subject to qualifications described subsequently in this Complaint) was conveyed to plaintiff by a deed dated July 7, 1971 by United Berkeley Realty Enterprises Corporation. (United Berkeley)

2. Simultaneously with the conveyance to plaintiff of the

property described above, plaintiff executed and delivered to its grantor, United Berkeley, a purchase money mortgage in the principal amount of Four Million Fifty Thousand Dollars (\$4,050,000). A copy of this mortgage is attached to this Complaint as Exhibit One.

3. On the same day that plaintiff executed the mortgage to United Berkeley, July 7, 1971, United Berkeley assigned the mortgage to defendant. A copy of the assignment is attached to this Complaint as Exhibit Two.

4. Under paragraph 3 of the mortgage (Exhibit One) the principal balance is subject to certain reductions, as follows:

- (a) For principal and interest payments paid by plaintiff on account of mortgage of record prior to June 28, 1971, covering all or part of the subject property (Exhibit One - Paragraph 3A);
- (b) For taxes and interest due on the subject premises to July 7, 1971; for taxes and interest accruing after July 7, 1971 on that portion of the subject premises described in the mortgage as constituting "Phase II"; and, for interest paid on money borrowed by plaintiff to purchase tax sale certificates on the portion of the premises constituting "Phase II", even if the certificate covered taxes prior to July 7, 1971. (Exhibit One - Paragraph 3B).
- (c) For costs of clearing title to any portion of the premises. (Exhibit One - Paragraph 3C).
- (d) For the sum of \$50.00 for each lot sold; to be paid to Jerry Zohn, Esq. (Exhibit One - Paragraph 3D).
- (e) For Plaintiff's costs in covering any judgments or other liens against the subject premises (Exhibit One - Paragraph 3E)

(f) For a "fair price adjustment" if United Berkeley could not convey marketable title to a portion or portions of the premises. (Exhibit One - Paragraph 3F).

Attached to this Complaint as Exhibit Three is a schedule prepared by plaintiff (sub-divided by schedules lettered to match the letters of the appropriate paragraphs of the mortgage) showing the credits due to plaintiff against the principal debt of the mortgage on account of the adjustments described in the preceding paragraph. The adjustments due to plaintiff, as set forth in Exhibit Three, exceed the amount of the principal debt of the mortgage held by defendant.

5. One of the adjustments included in Exhibit Three (Schedule F) is for the "fair price adjustment" on account of property to which United Berkeley could not convey title. Paragraph 3F of the mortgage provides that if the parties are unable to agree on the amount of this adjustment (plaintiff and defendant have not been able to agree) the issue is to be decided by three appraisers, one appointed by each party and a third by the two so appointed. When it became apparent that the parties could not reach an agreement, plaintiff on March 19, 1973 served upon defendant's attorney a written notice designating an appraiser. Defendant has never responded to this notice, nor designated its appraiser, despite repeated oral and written demands that it do so.

6. Defendant's refusal to appoint an appraiser is only one aspect of its persistent refusal to cooperate with plaintiff in any fair or reasonable manner in connection with the mortgage, as will become more apparent in the balance of the Complaint. Defendant is attempting unfairly to create economic pressure upon plaintiff which defendant intends to use to force plaintiff to pay money ^{to it} which plaintiff is under no legal obligation to pay.

WHEREFORE plaintiff requests judgment of this Court on this count:

- a. Fixing and determining the amount owed to defendant by plaintiff, if any;
- b. Such other relief as the Court may deem equitable and just, and
- c. For costs

SECOND COUNT

1. Plaintiff incorporates herein all of the allegations contained in the First Count of this Complaint.

2. Schedule B of the mortgage (Exhibit One) grants plaintiff the right to create a new mortgage covering the subject premises and provides that the mortgage now held by defendant will be subordinated to the new mortgage, provided that the new mortgage does not exceed \$3,300,000 and that it is a first lien on the subject property. These events have occurred, in compliance with the provision described.

3. Paragraph II (b) of Schedule B of the Mortgage (Exhibit One) provides that plaintiff may obtain releases of individual lots as selected by plaintiff from the lien of the mortgage now held by defendant if plaintiff, simultaneously with the sale of those lots, reduces the principal balance of the new mortgage by the sum of \$2,200 per lot. Plaintiff is not required to make any payment to defendant to obtain these releases; the only requirement being that the sum of \$2,200 per lot be paid to the new first mortgagee in reduction of principal.

4. Plaintiff is under contract with the Mayer Corporation to sell to it blocks of lots in the subject premises. Defendant refuses to deliver to plaintiff releases from the lien of defendant's mortgages, as required by those provisions of the mortgage

described above. The result of defendant's refusal to comply with its contractual obligation is that the purchase price of 22 lots already conveyed to the Mayer Corporation is being held in escrow pending receipt of the appropriate releases from defendant, which defendant refuses to provide despite repeated oral and written demands from plaintiff.

5. In addition to the foregoing, the Mayer Corporation has served time of the essence notices upon plaintiff, in order to compel plaintiff to convey title to additional lots which are under contract. If plaintiff cannot obtain the necessary releases from defendant for these future conveyances, plaintiff may be forced into default under its contract with the Mayer Corporation and, as a result, suffer extensive damages. Defendant is not only aware of all of the above facts, but is attempting by its actions to use these circumstances to extract unwarranted economic concessions from plaintiff.

6. In addition to the foregoing, plaintiff has obtained from Chase Manhattan Bank a firm written mortgage commitment for \$5,000,000. Chase Manhattan is willing to accept as security for its loan a first mortgage upon the balance of the lots of which defendant is obligated to deliver releases upon payment of \$2,200. per lot to the present first mortgagee.

7. Because of defendant's past actions, plaintiff believes defendant will not comply with its obligations to deliver releases to plaintiff upon compliance by plaintiff with the terms of the mortgage, and defendant's attorney has so indicated orally.

WHEREFORE, plaintiff requests judgment from the Court on this Count as follows:

a. For an order directing and compelling defendant to deliver to plaintiff releases of lots from the lien of defendant's mortgage upon payment by plaintiff to the first mortgagee on account of

principal of the sum of \$2,200 per lot, in accordance with the provisions of Schedule B, Paragraph II (b) of the mortgage between Plaintiff and Defendant

b. For such other relief as the Court may deem just and equitable.

THIRD COUNT

1. Plaintiff repeats all of the allegations contained in the First and Second Counts of the Complaint.

2. As a result of Defendant's actions, Plaintiff is suffering continuing damages, all of which are related to Defendant's breach of its contract with Plaintiff.

3. Plaintiff has continuously kept Defendant informed of the effects being caused by its refusal to comply with the terms of its contract with Plaintiff.

WHEREFORE, Plaintiff requests judgment of this court on this Count, as follows:

- a. For damages, both compensatory and punitive.
- b. For such other relief as the Court may deem to be just and equitable.
- c. For costs.

FOURTH COUNT

1. Plaintiff repeats the allegations contained in paragraphs 1, 2, 3 and 4 of the First Count.

2. The mortgage was originally recorded on July 8, 1971 in Mortgage Book 1621 at page 97, and was re-recorded on January 12, 1973 in Mortgage Book 1738 at page 1 by Defendant, or its agents.

3. Subsequent to the title closing, which was held on July 7, 1971, Plaintiff acquired various tracts of land which were included in the deed from United Berkeley to Plaintiff and in the mortgage, the descriptions in the deed and mortgage being identical. Title to these tracts was acquired from persons other than United Berkeley.

4. The description in the deed and mortgage aforesaid, also included certain tracts of land to which United Berkeley did not have title and which have not been acquired by Plaintiff, but may be acquired in the future.

5. Defendant wrongfully asserts that the mortgage held by it (Exhibit 1), covers these after-acquired, and not yet acquired, tracts, some of the after-acquired tracts having been sold, and Defendant having refused to give releases.

WHEREFORE, Plaintiff requests judgment on this Count, as follows:

a. Declaring that the mortgage does not cover tracts of land included within its description to which United Berkeley did not have title, at time of closing.

b. For such other relief as the Court may deem to be just and equitable.

c. For costs.

FIFTH COUNT

1. Plaintiff repeats the allegations contained in paragraphs 1, 2, and 3 of the Complaint.

2. The mortgage note (Exhibit 4), and the mortgage (Exhibit 1), both provide that interest shall be computed from June 29, 1973 and thereafter interest shall be payable quarterly at 6% commencing October 1, 1973.

3. Plaintiff does not wish to be in default on its obligation, but cannot determine the amount of interest to be paid until the amount, if any, owed to Defendant by Plaintiff is determined, pursuant to the First Count hereof.

WHEREFORE Plaintiff requests judgment on this Count as follows:

a. Declaring that Plaintiff need make no interest payments until the amount due, if any, on the mortgage is determined and that interest, if any, shall be computed on such amount from June 29, 1973.

b. For such other relief as the Court may deem to be just and equitable.

c. For costs.

Dated: April 30, 1973

MOSER, GRIFFIN, KERBY & COOPER
Attorneys for Plaintiff

By

Bryant W. Griffin
Bryant W. Griffin
A Member of the Firm
9 De Forest Avenue
Summit, N. J. 07901

Exhibit I

July 8, 1971
MB 1621/97
A-9

MORTGAGE

THIS INDENTURE made the 7 day of ~~June~~^{July}, in the year of our Lord One Thousand Nine Hundred and Seventy-one between BAY POINT CORP., a corporation of the State of New Jersey with offices in Summit, New Jersey, Mortgagor, and UNITED BERKELEY REALTY ENTERPRISES CORPORATION, a corporation of the State of New Jersey with its principal office at 744 Broad Street, Newark, New Jersey (Mortgagee),

WITNESSETH that Mortgagor is justly indebted to Mortgagee in the sum of FOUR MILLION FIFTY THOUSAND and 00/100 DOLLARS (\$4,050,000.00) lawful money of the United States of America, evidenced by its note bearing even date herewith, which note provides that the obligation shall not carry interest from the 29th day of June, 1971, until the 29th day of June, 1973, and thereafter interest shall be payable quarterly, at the rate of 6% per annum, on the first day of each calendar quarter, commencing October 1, 1973. The principal balance, together with accrued interest, shall become due on June 29, 1976. The Mortgagor has given, granted, bargained, sold and conveyed, and by these presents does give, grant, bargain, sell and convey to the said Mortgagee, and to its successors and assigns forever, all that certain tract or parcel of land situate, lying and being in the Township of Berkeley, County of Ocean, and State of New Jersey, as described in Schedule A attached hereto and made a part hereof.

TOGETHER with all and singular the appurtenances to the same belonging or in anywise appertaining; also all the estate, right, title, interest, property, claim and demand whatsoever of the said Mortgagor of, in and to the same, and of, in and to every part and parcel thereof; to have and to hold the same with

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continued.....

the appurtenances, unto the Mortgagee, its successors and assigns forever;

PROVIDED ALWAYS, and these presents are upon this condition, that if the said Mortgagor shall well and truly pay at maturity and principal and interest of a certain promissory note given by Mortgagor to Mortgagee, bearing even date herewith, as modified by the provisions hereof, or any renewal or renewals thereof, or of any part or parts thereof, then these presents shall become void, and the estate hereby granted shall cease and utterly determine.

The execution of this mortgage by Mortgagor and the acceptance thereof by Mortgagee, constitute an agreement as follows:

1. The entire mortgaged premises are described in Schedule A attached hereto. Schedule C attached hereto, is a description of the property hereinafter referred to as Phase I. The remaining property described in Schedule A, but not covered by Schedule C, is referred to as Phase II.

2. The provisions of Schedule B attached hereto and made a part hereof, shall be observed by the parties hereto.

3. The face amount of \$4,050,000.00 evidenced by the promissory note bearing even date herewith and secured by this mortgage, shall be reduced by the following whether paid heretofore or hereafter;

A. Principal and interest paid by Mortgagor on mortgages of record prior to June 28, 1971, covering all or part of the premises.

B. The amount of real estate taxes and interest which are due to date on the mortgaged premises and, in addition thereto, the amount of taxes and interest which hereafter accrue on the property included in Phase II and interest (at the rate paid by Mortgagor for the money used to purchase such certificates),

on money advanced by Mortgagor for the purchase of outstanding tax sale certificates covering Phase II, even though such tax sale certificates cover taxes for periods prior to the date hereof.

C. Any costs of clearing title to any portion of the mortgaged premises, including, but not limited to, the costs of riparian grants, outstanding franchise taxes owed by corporations in the chain of title other than Mortgagor, as of the date hereof, municipal assessments, judgments, water charges, mechanics' liens, as of the date hereof, stop notices, as of the date hereof, or other liens, including reasonable attorneys' fees in connection with any of the foregoing.

D. The sum of \$50.00 for each lot sold, which sum is to be paid to Jerry Zohn, Esq., pursuant to an agreement among Mortgagee, Mortgagor, and Jerry Zohn, Esq., bearing even date herewith.

E. The amount which it actually costs Mortgagor, if Mortgagor chooses to post bonds or make deposits to cover certain judgments or other liens. This cost shall include the interest paid on money borrowed to make such deposits at the rate paid by Mortgagor for such money, the cost of bonds procured and any sums ultimately paid to release such judgments or liens.

F. The amount determined as the fair price adjustment, if Mortgagee cannot convey marketable title as to a portion or portions of the mortgaged premises. If this price adjustment cannot be agreed upon between the parties hereto, it shall be determined by a majority vote of two of the three appraisers, one to be appointed by each party, and the third by the two so appointed. Mortgagor and Mortgagee shall each appoint its appraiser on a mutually agreeable date but in any event no later than August 1, 1973. If either does not, the one so appointed

may appoint a second and these two shall determine the price. The appraisers shall consider the terms of the sale, the reasonable value of the property and any other pertinent factors, in establishing a price and also in establishing the terms under which the price shall be paid. The decision of the appraisers shall be rendered within 45 days after their appointment. The decision of the appraisers as to price and terms shall be binding and not subject to appeal. Cost shall be divided between the parties.

4. Mortgagor shall have the right to prepay this mortgage in full or in part at any time without penalty. Any partial prepayment shall be applied against the next payment due.

5. Provisions for releasing property from the lien of this mortgage are contained in Schedule B attached hereto. Lots to be released shall be as selected by the mortgagor.

6. The unpaid balance due hereunder shall immediately become due and payable at the election of the Mortgagee in the event of:

A. Thirty days' default in any payment due hereunder; or

B. ^{*/}Ninety days after the filing of a petition against the Mortgagor or the owner of such mortgaged property for relief under any bankruptcy or insolvency law or the appointment of a Receiver of the property or any part thereof, or of the Mortgagor or of the owner of such mortgaged property, if such petition has not been dismissed or such receiver relieved within such 90-day period; or

C. The filing of a petition by the Mortgagor or the owner of such mortgaged property for relief under any bankruptcy or insolvency law; or

*/ As to Phase I and as to Phase II after good and marketable title exists,

D. An assignment by the Mortgagor or the owner of the mortgaged property of assets for the benefit of creditors; or

E. Any default in the covenants and conditions hereof

7. Should any tax, assessment, water rent or other municipal or governmental rate, charge, imposition or lien be hereafter imposed or acquired upon the premises described in this mortgage, and become due and payable, and should the said interest or any part thereof remain unpaid and in arrears for the space of 30 days, or said tax, assessment, water rent or other municipal or governmental rate, charge, imposition, or lien, or any or either of them remain unpaid and in arrears for the space of 60 days, then and from thenceforth, after the lapse or expiration of either of the said periods as the case may be, the aforesaid principal sum, with all arrearage of interest thereon, shall, at the option of the said Mortgagee, become and be due and payable immediately. Payment of such taxes or other charges assessed on Phase I property for the year 1971 need not be paid prior to December 31, 1971, and on Phase II property, for a period of 90 days after title is clear.

8. Mortgagee may (if Paragraph 7 is in default) pay such tax, assessment, or water rent in arrears, or pay any other lien affecting the mortgaged premises, and the amount so paid shall be added to and become part of the principal sum secured by this mortgage, and shall be payable on demand with interest at six percent per annum.

9. If default shall be made in any of the aforesaid covenants or conditions, the Mortgagee and assigns, shall have the right forthwith to enter upon and take possession of the said mortgaged premises, and to let the said premises, and receive the rents, issues and profits thereof, and to apply the same, after payment of all necessary charges and expenses, on account of the amount hereby secured, and said rents and profits are, in the event of any such default, hereby assigned to the Mortgagee and the Mortgagee shall also be at liberty immediately after any

...upon proceedings being commenced for the foreclosure of this mortgage, to apply for the appointment of a receiver of the rents and profits of the said premises, and be entitled to the appointment of such receiver as a matter of right, as security for the amounts due the Mortgagee, without consideration of the value of the mortgaged premises or solvency of any person or persons liable for the payment of such amounts.

10. Based upon title information dated March 24, 1971, mortgagor represents that solely with respect to the payments required by Paragraph 3 A, B, C and E hereof, there will be a principal balance on this mortgage of at least \$1,000,000.00.

All the terms, covenants and conditions herein shall inure to the benefit of and shall bind the parties hereto, their successors and assigns.

IN WITNESS WHEREOF, the Mortgagor has caused these presents to be signed and attested by its proper corporate officers and its corporate seal to be hereto affixed the day and year first above written.

BAY POINT CORP.

By

C. J. ACHEE, President

ATTEST:

SECRETARY

STATE OF NEW JERSEY)
) SS.:
 COUNTY OF Ocean)

BE IT REMEMBERED, that on this 7th day of July, 1971, before me the subscriber, a Notary Public for the State of New Jersey, personally appeared Catherine Gray Ahee, who being by me duly sworn on her oath says that she is the secretary of Bay Point Corp. the Mortgagor named in the foregoing instruments; that she well knows the corporate seal of said corporation; that the seal affixed to said instrument is the corporate seal of said corporation; that the said seal was so affixed and the said instrument signed and delivered by C. J. Ahee, who was at the date thereof the President of said corporation, in the presence of this deponent, and said President, at the same time acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, and as the voluntary act and deed of said corporation, by virtue of authority from its Board of Directors, and that deponent, at the same time, subscribed her name to said instrument as an attesting witness to the execution thereof.

Catherine Gray Ahee
 CATHERINE GRAY AHEE

Sworn and Subscribed
 before me at
 this 7th day of July, 1971.

Bryant W. Griffin
 BRYANT W. GRIFFIN
 Attorney at Law of New Jersey
 PREPARED BY:

BRYANT W. GRIFFIN, ESQ.

All those certain tracts of land situate, lying and being in the Township of Berkeley, County of Ocean and State of New Jersey as shown on "Map of Property of Fair-Mar Corporation (formerly Owned by Berkeley Shore Estates) including Berkeley Shore Estates - Sloop Creek Estates - Florence T. Allen Property, Berkeley Township, Ocean County, New Jersey", Scale 1" = 200' dated September 23, 1968 prepared by Alfred L. Messano, P.E. & L.S. Toms River, New Jersey.

BEGINNING at a point in the Northerly line of Sloop Creek Road (33' wide) said point being the Southeast corner of property of Florence T. Allen, the Southwest corner of property conveyed to Mildred J. McKinstry by Florence T. Allen in book of deeds 1412 page 338 and being the following two courses from the intersection of said Northerly line of Sloop Creek Road with the Easterly line of New Jersey State Highway Route Number 9; thence

- (1) Along said Northerly line of Sloop Creek Road South 72 degrees 14 minutes 12 seconds East 477.91 feet to a point; thence
- (2) Still along said Northerly line of Sloop Creek Road South 69 degrees 39 minutes 53 seconds East 450.81 feet to a point; thence

From said point of beginning running; thence

- (1) Along the Easterly line of Florence T. Allen property and the Westerly line of Mildred J. McKinstry property North 20 degrees 20 minutes 07 seconds East 680.11 feet to a point in the line established by deed book 1864 page 481 between Florence T. Allen and Sloop Creek Estates, a Corporation of the State of New Jersey and the Northeast corner of property of Florence T. Allen; thence
- (2) Along said line of agreement and the Southerly line of "Map of Sloop Creek Estates, Section 2, Berkeley Township, Ocean County, New Jersey", filed in the Ocean County Clerk's Office May 28, 1958 as Map No. D-299, South 77 degrees 12 minutes 24 seconds East 1,020.54 feet to a point; thence
- (3) Still along said line of agreement and the Southerly line of the "Amended Map of Sloop Creek Estates, Section 3, Berkeley Township, Ocean County, New Jersey" filed in the Ocean County Clerk's Office September 15, 1959 as Map No. E-60. South 77 degrees 16 minutes 24 seconds East 1,116.50 feet to a point, the intersection of said line of agreement with the Westerly line of Elm Street as shown on said map; thence
- (4) Along said Westerly line of Elm Street North 12 degrees 48 minutes 07 seconds East 98.70 feet to its intersection with the Southerly line of Anchorage Boulevard as shown on said map; thence
- (5) Along said Southerly line of Anchorage Boulevard North 77 degrees 11 minutes 53 seconds West 716.50 feet to a point, the intersection of said Southerly line with the Westerly line of 5th street, as shown on said map, extended Southerly; thence

continued.....

- (6) Along said Westerly line of 5th Street North 12 degrees 48 minutes 07 seconds East 800.00 feet to a point in the Northerly line of Moorage Avenue as shown on said map; thence
- (7) Along said Northerly line of Moorage Avenue South 77 degrees 11 minutes 53 seconds East 356.50 feet to its intersection with the Westerly line of Moorage Avenue as shown on said map; thence
- (8) Along said Westerly line of Moorage Avenue as shown on said map and along the Westerly line of Moorage Avenue as shown on "Final Map of Berkeley Shore Estates, Lagoon Section 5, Berkeley Township, Ocean County, New Jersey", filed in the Ocean County Clerk's Office November 16, 1961 as Map No. E-101, North 12 degrees 48 minutes 07 seconds East 635.01 feet to a point of curvature of a curve to the right having a radius of 325.00 feet; thence
- (9) Still along said Westerly line of Moorage Avenue along a curve to the right having a radius of 325.00 feet an arc distance of 94.83 feet to the point of tangency of said curve; thence
- (10) Still along said Westerly line of Moorage Avenue North 29 degrees 31 minutes 14 seconds East 211.26 feet to a point, the Northeast corner of property conveyed to the Township of Berkeley in Book 2249 Page 8; thence
- (11) Along the Northerly line of said property conveyed to the Township of Berkeley on a curve to the left having a radius of 1400.00 feet an arc distance 527.59 feet to the point of curvature of a curve to the left having a radius of 800.00 feet; thence
- (12) Along the Southerly line of Ford Avenue as shown on "Final Map of Berkeley Shore Estates, Section C, Berkeley Township, Ocean County, New Jersey", filed in the Ocean County Clerk's Office June 27, 1961 as Map No. C-139, along a curve to the left having a radius of 800.00 feet an arc distance 87.33 feet to a point of reverse curvature; thence
- (13) Still along said Southerly line of Ford Avenue along a curve to the right having a radius of 625.00 feet an arc distance 233.32 feet to its intersection with the Easterly line of Red Bank Avenue as shown on said map; thence
- (14) Along said Easterly line of Red Bank Avenue South 12 degrees 48 minutes 07 seconds West 675.36 feet to a point in the Northerly line of Sloop Creek Estates, Section 3, herein beforementioned; thence
- (15) Along said line and the Northerly line of "Map of Sloop Creek Estates, Section 2, Berkeley Township, Ocean County, New Jersey", filed in the Ocean County Clerk's Office May 28, 1958 as Map No. D-299, North 77 degrees 25 minutes 53 seconds West 1417.50 feet to a point, the Southeast corner of property conveyed by Berkeley Shore Estates Inc. to Arthur Efros; thence
- (16) Along the Easterly line of lands of Arthur Efros and the Easterly line of lands now or formerly John Enggren North 12 degrees 24 minutes 30 seconds East 996.53 feet to a point the Northeast corner of property now or formerly John Enggren; thence

- (17) Along the Northerly line of lands now or formerly John Enggren North 77 degrees 35 minutes 30 seconds West 642.80 feet to a point in the Easterly line of New Jersey State Highway Route 9 which point is 33.00 feet Easterly from the centerline of said highway and the Northwest corner of property now or formerly of John Enggren; thence
- (18) North 12 degrees 25 minutes 30 seconds East partly along the Easterly right of way line of said highway and partly along the Easterly right of way line of Mill Creek Road 701.82 feet to the intersection of the Easterly line of Mill Creek Road with the Southerly right of way of Ocean Gate Drive; thence
- (19) Easterly along the Southerly right of way line of Ocean Gate Drive on a curve to the left having a radius of 575.70 feet an arc distance 557.47 feet to the point of tangency of said curve; thence
- (20) Still along said line of Ocean Gate Drive North 41 degrees 49 minutes 45 seconds East 2591.81 feet to its intersection with the Southerly line of Louis Avenue; thence
- (21) Along said line of Louis Avenue South 78 degrees 59 minutes 20 seconds East 139.63 feet to a point; thence
- (22) Along the Westerly line of map entitled "Plan of Ocean Gate, Ocean County, New Jersey, Section No. 4", filed in the Ocean County Clerk's Office August 2, 1912 as Map No. C-176, South 06 degrees 00 minutes 40 seconds West 853.25 feet to a point in the Northerly line of map of "Berkeley Shore Estates, Section A, Berkeley Township, Ocean County, New Jersey" filed in the Ocean County Clerk's Office October 25, 1957 as Map No. B-57; thence
- (23) Along the Northerly line of property of Berkeley Shore Estates and a line running parallel to and distant 100.00 feet from the Southerly line of Wickman Avenue as shown on Plans of Ocean Gate, Section No. 4 and Section No. 5 South 78 degrees 59 minutes 20 seconds East 3502.54 feet to a point the Northwest corner of Lot 37 Block 197 as shown on herein Beforementioned Plan of Ocean Gate, Section No. 4; thence
- (24) Along the Westerly line of Lots 37 and 38 Block 197 South 11 degrees 00 minutes 40 seconds West 40.00 feet to the Southwest corner of Lot 38; thence
- (25) Along the Southerly line of Lot 38 South 78 degrees 59 minutes 20 seconds East 100.00 feet to a point in the Westerly line of Stone Harbor Avenue as shown on said map, the Southeast corner of Lot 38; thence
- (26) Along said Westerly line of Stone Harbor Avenue North 11 degrees 00 minutes 40 seconds East 40.00 feet to a point, the Northeast corner of Lot 37; thence
- (27) Along the Northerly line of property of Berkeley Shore Estates and a line running parallel to and distant 100.00 feet from the Southerly line of Wickman Avenue South 78 degrees 59 minutes 20 seconds East 3400.00 feet to a point; thence

- (18) Along a line running North 11 to and distant 100.00 feet Easterly from the Easterly line of Liberon Avenue as shown on Plan of Ocean Gate, Section No. 5, North 11 degrees 00 minutes 40 seconds East 250.00 feet to a point in the Southerly line of Louis Avenue; thence
- (29) Along said Southerly line of Louis Avenue South 78 degrees 59 minutes 20 seconds East 303.25 feet to its intersection with the Southerly line of property formerly the Philadelphia and Long Branch Railroad; thence
- (30) Along said railroad line South 64 degrees 10 minutes 20 seconds East 2479.91 feet to a point in the Easterly right of way line of Bayview Avenue (66 feet wide) a county road; thence
- (31) Along said right of way line on a curve to the right having a radius of 810.64 feet an arc distance of 150.40 feet to a point in the Southerly line of a 50 feet wide road running Easterly from Bayview Avenue to Barnegat Bay; thence
- (32) Along the Southerly edge of said road South 64 degrees 08 minutes 10 seconds East 264.00 feet to a bend in said road; thence
- (33) Along the Westerly edge of said road South 25 degrees 51 minutes 50 seconds West 86.20 feet to an angle point in said road; thence
- (33A) South 49 degrees 44 minutes 50 seconds West 40.6 feet to a point; thence
- (34) Still along said Westerly edge of said road South 40 degrees 15 minutes 10 seconds East 100 feet more or less to a point in the mean high water line of Barnegat Bay; thence
- (35) Westerly along said mean high water line of Barnegat Bay 110 feet more or less to the mouth of a lagoon; thence
- (36) Southwesterly across the mouth of said lagoon 68 feet more or less to a point in the mean high water line of Barnegat Bay; thence
- (37) Southwesterly along said mean high water line 125 feet more or less to a point in the Northerly line of property of Charles A. Becker; thence
- (38) Along said Northerly line of property of Charles A. Becker North 63 degrees 26 minutes 10 seconds West 268.80 feet to a point in the Easterly line of Bayview Avenue, said point being 357.00 feet on a course of South 41 degrees 46 minutes 50 seconds West from the end of the 31st course herein described; thence
- (39) Southwesterly along the Easterly line of Bayview Avenue along a curve to the right having a radius of 810.64 feet an arc length of 86.32 feet the chord of which is 86.28 feet and has a bearing of South 57 degrees 33 minutes 05 seconds West; thence

- (40) South 18 degrees 58 minutes 50 seconds West 85.05 feet to a bend in Sea Weed Creek; thence
- (41) South 38 degrees 52 minutes 03 seconds East 178.00 feet to a bend in Sea Weed Creek; thence
- (42) South 10 degrees 27 minutes 57 seconds West to a point; thence
- (43) South 76 degrees 32 minutes 03 seconds East 162.00 feet to a tack in a bulkhead on Barnegat Bay; thence
- Beginning again at said beginning point and running; thence
- (44) Along said Northerly line of Sloop Creek Road (33 feet wide) South 69 degrees 39 minutes 53 seconds East 600.00 feet to its intersection with the Westerly line of Stott Street as shown on map of "Venice, Essex Subdivision, Berkeley Township, Ocean County", filed in the Ocean County Clerk's Office October 29, 1926 as Map No. B-190; thence
- (45) Along said Westerly line of Stott Street North 20 degrees 20 minutes 07 seconds East 27 feet to a point in the Northerly line of Sloop Creek Road (60 feet wide) as shown on said map; thence
- (46) Along said Northerly line of Sloop Creek Road (60 feet wide) South 69 degrees 39 minutes 53 seconds East 2200.00 feet to a point in the Easterly line of Laurel Street as shown on said map; thence
- (47) Along said Easterly line of Laurel Street South 20 degrees 20 minutes 07 seconds West 27 feet to its intersection with the Northerly line of Sloop Creek Road (33 feet wide); thence
- (48) Along said Northerly line of Sloop Creek Road (33 feet wide) South 69 degrees 39 minutes 53 seconds East 275.00 feet to a point; thence
- (49) North 20 degrees 20 minutes 07 seconds East, partly along the Westerly line of property conveyed to Ralph E. Pullen, et ux by Florence T. Allen in book of deed 2027 page 495, 235.23 feet to the Northwest corner of said Pullen property; thence
- (50) South 69 degrees 39 minutes 53 seconds East, along the Northerly line of said Pullen property and along the Northerly line of property conveyed to Leon J. and Shirley Leist by Florence T. Allen in book of deeds 1727 page 85, 200.00 feet to the Northeast corner of said Leist property; thence
- (51) South 20 degrees 20 minutes 07 seconds West, partly along the Easterly line of property conveyed to Leon J. and Shirley Leist by Florence T. Allen in book of deeds 1727 page 85 and in book of deed 1795 page 44, 192.44 feet to a point in the Northerly line of Sloop Creek Road (33 feet wide); thence
- (52) Along said Northerly line of Sloop Creek Road, North 76 degrees 28 minutes 42 seconds East 157.69 feet to a point; thence

- (53) Still along said Northerly line of Sloop Creek Road, South 74 degrees 31 minutes 18 seconds East 204.73 feet to a point, the Northeast corner of Bayview Avenue and Sloop Creek Road, said point being 25 feet East of the Centerline of Bayview Avenue and being the Southwest corner of property conveyed to Anthony and Melva R. De Cicco by Florence T. Allen in book of deed 1533 page 30; thence
- (54) Along the Easterly line of Bayview Avenue, running parallel to and 25 feet from the centerline thereof, and along the Westerly line of property conveyed to De Cicco North 23 degrees 58 minutes 04 seconds East 100.00 feet to the Northwest corner of said De Cicco property; thence
- (55) Along the Northerly line of said De Cicco property South 81 degrees 06 minutes 40 seconds East 100.17 feet to a point, the Northeast corner of said De Cicco property; thence
- (56) Along the Easterly line of said De Cicco property, South 22 degrees 29 minutes 04 seconds West 100.00 feet to a point in the Northerly line of Sloop Creek Road (33 feet wide). The Southeast corner of said De Cicco property; thence
- (57) Along said Northerly line of Sloop Creek Road South 83 degrees 41 minutes 18 seconds East 265.95 feet to a point; thence
- (58) North 82 degrees 36 minutes 36 seconds East 156.18 feet to a point in the Westerly line of property conveyed to Anton Lederle by David A. and Edith N. Veeder and Albert S. and Anna C. Tilton in book of deeds 726 page 118; thence
- (59) Along the Westerly line of said Lederle property North 12 degrees 37 minutes 20 seconds East 83.65 feet to a point, the Northwest corner of said Lederle property; thence
- (60) Along the Northerly line of said Lederle property South 85 degree 27 minutes 40 seconds East 50.00 feet to a point in the Westerly line of Bay Street, the Northeast corner of said Lederle property thence
- (61) Along said Westerly line of Bay Street North 12 degrees 37 minute 20 seconds East 152.10 feet to the point of curvature of a curve to the left having a radius of 99.40 feet; thence
- (62) Still along said Westerly line of Bay Street on a curve to the left having a radius of 99.40 feet an arc distance of 52.28 feet to the point of tangency of said curve; thence
- (63) Still along said Westerly line of Bay Street North 17 degrees 30 minutes 40 seconds West 58.25 feet to its intersection with the Northerly line of and terminus of Bay Street; thence
- (64) Along said Northerly line of Bay Street North 72 degrees 29 minut 20 seconds East 50 feet to a point, its intersection with the Easterly line of Bay Street and the Northwest corner of property conveyed to John R. McGuire by Florence T. Allen in book of deeds 1585 page 130; thence

- (65) Along the Northerly line of said McGraw property South 77 degrees 22 minutes 40 seconds East 100 feet more or less to the Westerly shore line of Big Sloop Creek; thence
- (66) Along said Westerly shore line of Big Sloop Creek Southeasterly 293 feet more or less to a point; thence
- (67) North 82 degrees 36 minutes 36 seconds East 25 feet more or less to a point; thence
- (68) North 89 degrees 51 minutes 36 seconds East 60 feet more or less to a point in the Easterly shore line of Big Sloop Creek; thence
- (69) Along said Easterly shore line of Big Sloop Creek Southeasterly and along the mean high water line of Barnegat Bay Northeasterly the various courses thereof, be the distance what it may to the terminus of the 43rd course herein described.

Subject to any easement of record including those that are shown on "Map of Property of Fair-Mar Corporation" hereinbefore mentioned and any maps filed in the Ocean County Clerk's Office

Subject to private and public rights in the beds of any streets and right of ways shown on any maps filed in the Ocean County Clerk's Office of portions of said lands herein described including but not limited to Sloop Creek Road, New Jersey State Highway Route No. 9, Millcreek Road, Ocean Gate Drive and Bayview Avenue as shown on "Map of Property of Fair-Mar Corp." hereinbefore mentioned.

EXCEPTING THEREOUT AND THEREFROM THE FOLLOWING DESCRIBED PREMISES

Plan of Berkeley Shore Estates, Section A, Berkeley Township, Ocean County, New Jersey, Filed.

Block 1	Lots 1 to 18 inclusive
Block 2	Lots 1 to 16 inclusive
Block 3	Lots 1 to 16 inclusive
Block 4	Lots 1 to 9 inclusive, 16 to 20 inclusive, 22, 23, 24 & 25
Block 5	Lots 1 to 17 inclusive
Block 6	Lot 1, 6 to 10 inclusive
Block 7	Lots 1 to 8 inclusive
Block 8	Lots 1 & 2
Block 9	Lots 1 & 2
Block 10	Lots 1 & 3
Block 14	Lots 1, 2, 3, 5 & 7

Plan of Berkeley Shore Estates, Section C, Berkeley Township, Ocean County, New Jersey, Filed.

Block 88	Lots 3, 4, & 5
Block 89	Lots 1, 4, 6, 9, 10, 11, 13, 15, 17 to 21 inclusive
Block 90	Lots 1, 2, 3, 4, 5, 9, 11, 12, 15, 17, 19 to 24 inclusive

Continued.

Map of Naples Subdivision of Venice, which Map as filed in the Ocean County Clerk's Office at Toms River;

Block 1	Lots 2, 3, 41, 42
Block 2	Lots 27, 28
Block 3	Lots 23, 24, 30, 31
Block 4	Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 & 13

Map of Venice, Subdivision of Essex, which Map as filed in the Ocean County Clerk's Office at Toms River;

Block 1	Lots 5 to 24 inclusive
Block 2	Lots 1 to 8 inclusive & 21 to 40 inclusive
Block 3	Lots 15 to 44 inclusive
Block 4	Lots 1 to 4 inclusive, 7 & 8, 19 to 22 inclusive
Block 5	Lots 1 to 20 inclusive
Block 6	Lots 1 to 40 inclusive
Block 7	Lots 1 to 44 inclusive
Block 9	Lots 1 & 2, 9, 10 & 11
Block 10	Lots 1 to 4 inclusive, 19 to 36 inclusive
Block 11	Lots 1 to 7 inclusive

Map of Berkeley Shore Estates, Lagoon Section 1, as filed in the Ocean County Clerk's Office at Toms River;

Block 1	Lots 1 & 2
Block 2	Lots 1 to 6 inclusive, 10 to 20 inclusive, 22 to 30 inclusive
Block 6	Lots 1, 2 & 3
Block 7	Lots 1 to 14 inclusive
Block 8	Lots 1 to 11 inclusive, 13 & 14
Block 9	Lots 1 to 6 inclusive, & 8 to 16 inclusive

Map of Berkeley Shore Estates, Lagoon Section 2, as filed in the Ocean County Clerk's Office at Toms River;

Block 2	Lots 31 to 34 inclusive
Block 3	Lots 1, 3, 5 to 11 inclusive, 13 to 18 inclusive
Block 4	Lots 2, 4 to 11 inclusive, 13 to 15 inclusive, 17 to 20 inclusive
Block 5	Lots 2 to 7 inclusive, 9, 10, 14, 17 & 18
Block 6	Lots 6, 8 to 12 inclusive, 14, 17 to 22 inclusive, 25, 29, 32 34 inclusive, 38, 39 & 41
Block 7	Lots 15 to 27 inclusive, 29 & 30, 33 to 37 inclusive & 39
Block 8	Lots 15 to 21 inclusive & 24 to 31 inclusive

Map of Pebble Beach, Property of Sloop Creek Estates, Blocks 4, 5 & 6, Lagoon Section 3, as filed in the Ocean County Clerk's Office at Toms River;

Block 5	Lots 5, 7, 10 & 12, 21, 22, 23, 25, 26, 27, 29 & 31 & 33
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Map entitled Final Map Berkeley Shore Estates, Lagoon Section 5, Berkeley Township, New Jersey, as filed in the Ocean County Clerk's Office at Toms River;

Block 81	Lots 24 & 25
Block 80	Lots 24 & 25
Block 79	Lots 1 to 25 inclusive
Block 77	Lots 23, 24, 25, 26 & 27, 34, 36, 37, 38, 40, 42, 46, 47
Block 78	Lots 1 to 14 inclusive, 16 to 50 inclusive

continued.....

ALSO EXCEPTING THEREOUT AND THEREFROM THE FOLLOWING:

Sewerage treatment plant site as described in Deed Book 2635, page 285, containing 10.969 acres more or less

Situate in the Township of Berkeley, County of Ocean and State of New Jersey, bounded and described as follows:

BEGINNING at a point where the proposed Westerly line of Sherman Avenue intersects the Northerly line of Sloop Creek Estates Section 2, which map is on file in the Ocean County Clerk's Office, said beginning point also being the intersection of the Westerly line of Second Street with the Northerly line of Sloop Creek Estates Section 2; thence

- (1) Along the said Northerly line of Sloop Creek Estates Section 2, North 77 degrees 26 minutes 03 seconds West 150 plus or minus to a point, said point being the Southeasterly corner of land now or formerly Effros, thence
- (2) North 12 degrees 24 minutes 30 seconds East along said land of Effros and land now or formerly of Enggren 996.53 feet to the Easterly most corner of said Enggren property; thence
- (3) South 77 degrees 35 minutes 45 seconds East along the Northeasterly most line of said Enggren property extended in a Southeasterly direction 163.33 feet to a point in the Westerly line of a proposed extension of Sherman Avenue Southerly from Veeder Lane said point being distant 631.67 feet on a course South 19 degrees 04 minutes 30 seconds West from the Southwesterly most corner of Sherman Avenue and Veeder Lane as shown on a map of Berkeley Shore Estates, Section A which map is on file; thence
- (4) South 19 degrees 04 minutes 30 seconds West along the Westerly line of said proposed extension of Sherman Avenue 25.41 feet to a proposed point of curvature; thence
- (5) Continuing along the Westerly line of said proposed extension of Sherman Avenue along a curve bearing to the left having a radius of 2,732.87 feet an arc length of 299.695 feet to a point of tangency to said curve; thence
- (6) Continuing along the Westerly line of said Sherman Avenue proposed extension on a course South 12 degrees 47 minutes 30 seconds West 671.97 feet to the point and place of beginning.

11.50
EXCEPTING thereout and therefrom premises conveyed by Florence T. Allen to Leon J. Leist and wife in Deed Book 1727 Page 85 and being described as follows:

BEGINNING at a stake located at the Northwestern corner of Birch Street and Asbury Avenue as shown on Map of Allenport, Subdivision "B", said stake being located the following 2 courses from a monument located at the Southeast corner of Laurel Street and Sloop Creek Road as shown on Map of Essex Subdivision of Venice-Map #E-190.

- (1) North 21 degrees 36 minutes East along the Southeastern line of Laurel Street 148.23 feet to a point, the Northeast corner of Asbury Avenue and Laurel Street; thence
- (2) South 68 degrees 24 minutes East along the Northeastern line of Asbury Avenue 475 feet to a stake, the Northwestern corner of Asbury Avenue and Birch Street, the point or place of beginning.
- (1) North 68 degrees 24 minutes West along the Northeastern line of Asbury Avenue 100 feet to a stake; thence
- (2) North 21 degrees 36 minutes East 120 feet to a stake; thence
- (3) South 68 degrees 24 minutes East 100 feet to a stake in the Northwestern line of Birch Street; thence
- (4) South 21 degrees 36 minutes West 120 feet along the Northwestern line of Birch Street to the point or place of beginning.

BEING known as Lots 1, 2, 3, 4 on Map of Allenport, Subdivision "E" Berkeley Township, dated May 1, 1940.

ALSO EXCEPTING thereout and therefrom premises conveyed by Florence T. Allen to Leon J. Leist and wife in Deed Book 1795 Page 44 and being described as follows:

BEGINNING at the Southwestern corner of the property now owned by Leon J. Leist and Shirley Leist, his wife; thence

- (1) South 68 degrees 24 minutes East along the Southwestern line of the Leist property 100 feet to a stake; the Southeast corner of the said Leist property; thence
- (2) South 21 degrees 36 minutes West on a line with the Southeastern line of the Leist property 52 feet more or less to a point 20.5 feet more or less, radially to the center line of Sloop Creek Road, now 33 feet in width, said point being also 10 feet from the Southeastern line of the Allen property; thence

- (3) From said beginning point, the Southwesterly corner of the Leist property, South 21 degrees 36 minutes West on a line with the Northwesterly line of the Leist property 91 feet more or less, to a point 26.5 feet more or less, radially to the center line of Sloop Creek Road, said point being also 10 feet from the Southeasterly line of the said Allen property; thence
- (4) From the point at the end of the 2nd course stated above in a Southwesterly direction 109 feet more or less, along a line 10 feet Northwesterly from the Southeasterly line of the Allen property and also running 26.5 feet more or less, parallel with the Sloop Creek Road to the point at the end of the 3rd course stated above.

THE intention being to convey to Leon J. Leist and Shirley Leist, his wife, all of that land lying Southwesterly from the Southwesterly line of the present Leist property and between the Northwesterly and Southeasterly side lines of the said Leist property extended to a line 10 feet Northwesterly from the present Southeasterly line of the Allen property, also allowing 10 feet for the future widening of the Sloop Creek Road,

ALSO Excepting thereout and therefrom premises conveyed by Florence T. Allen to Ralph E. Pullen and wife in Deed Book 2027 Page 495 and being described as follows:

BEGINNING at a stake and pipe located at the Northwesterly corner of Lot 4 Block 26 on unfiled map of Allenport Subdivision "B" said stake being located the following 3 courses from a monument located at the Southeasterly corner of Laurel Street and Sloop Creek Road as shown on map of Essex Subdivision of Venice-Map #E-190;

- (1) North 21 degrees 36 minutes East along the Southeasterly line of Laurel Street 148.23 feet to a point, the Northeasterly corner of Asbury Avenue and Laurel Street; thence
- (2) South 26 degrees 24 minutes East along the Northeasterly line of Asbury Avenue 375 feet to a stake; the Southwesterly corner of Lot 4 Block 26; thence
- (3) North 21 degrees 36 minutes East along the Northwesterly line of Lot 4, 120 feet to a stake and pipe the point or place of beginning, said beginning point being also the Northwesterly corner of property owned by Leon and Shirley Leist; thence
- (1) North 68 degrees 24 minutes West, along the Southwesterly line of Lots 38, 33, 32 and 31, 100 feet to a stake the Southeasterly corner of Lot 30 and the Northeasterly corner of Lot 9; thence
- (2) South 21 degrees 36 minutes West along the Southeasterly line of Lot 9, 211.73 feet to a stake 26.5 feet from the center line of Sloop Creek Road (now 33 feet in width at this point); thence

- (4) In a southeasterly direction and parallel with the existing center line of Sloop Creek Road and 265 feet Northeasterly therefrom a distance of 100 feet plus to a stake; the southwesterly corner of the Leist property; thence
- (5) North 21 degrees 36 minutes East 211 feet more or less along the Northwesterly line of the Leist property to the point of beginning.

BEING known as Lots 5, 6, 7 and 8 Block 26 on unfiled map of Allentown, Subdivision "B" Berkeley Township and Parcel "B" which is that portion of land lying between the Southwesterly line Lots 5, 6, 7 and 8 and the Northeasterly line of the Sloop Creek Road having a uniform width of 100 feet, allowing 10 feet for the future widening of the present Sloop Creek Road.

ALSO
EXCEPTING thereout and therefrom premises conveyed by David A. Veeder et al, to Kurt R. Lederle in Deed Book 726 Page 115 and being more particularly described as follows:

ALL those 2 certain lots or parcels of land and premises hereinafter particularly described, situate, lying and being in the Township of Berkeley, County of Ocean and State of New Jersey, shown and designated on a map entitled "Venice, Naples Subdivision Berkeley Township, Ocean County, Bayshore Development Company, outline survey made by H.T. Green filed July 21, 1926, and designated as Lot 2 and 3, Block 1

BEGINNING at a point in the East bank of Sloop Creek where the said East bank is intersected by the North line of Naples Street; thence

- (1) Extending along the Northerly edge of Naples Street 78 5/10 feet to the Southwest corner of Lot 4 Block 1; thence
- (2) At right angles to Naples Street, Northerly along the Westerly edge of Lot 4, 125 feet to the Northwest corner of Lot 4; thence
- (3) Westerly and parallel with Naples Street be the distance what it may to the Easterly edge of Sloop Creek; thence
- (4) Down Sloop Creek and the several courses thereof in a Southwest and Southerly direction to the point or place of beginning.

SCHEDULE "B"

(This Schedule "B" is hereby annexed to and made an express part of a certain Indenture of Mortgage bearing date of the 7th day of July, 1971 from Bay Point Corp., a New Jersey corporation, to United Berkeley Realty Enterprises Corporation, a New Jersey corporation, covering certain lands therein more particularly described in the Township of Berkeley, County of Ocean and State of New Jersey)

(I) Notwithstanding anything to the contrary contained either in said Indenture of Mortgage or the Note or obligation pertaining thereto or any Contract heretofore made between United Berkeley Realty Enterprises Corporation and others to and with Sytco Corp., which said Contract was thereafter assigned by the said Sytco Corp. to Bay Point Corp., it is expressly covenanted, understood and agreed by and between the said Mortgagor and the said Mortgagee as follows: -

(a) The said Mortgagor, its successors and assigns, shall be obligated to fully pay and satisfy any and all tax indebtednesses, tax liens and tax claims, together with any and all interest and penalties thereon, now due and owing to the proper governmental authorities that touch and affect solely that portion of the mortgaged premises known as Phase I or any part thereof, being those lands more particularly described in and upon a certain Schedule "C" annexed hereto and made an express part hereof, at whichever following time or event occurs first: -

(1) Upon and simultaneous with the said Mortgagor, its successors or assigns creating any new future mortgage involving these same mortgaged premises or any part thereof in a total amount not to exceed \$3,300,000.00; or

(2) Within 90 days after the title to all of the Phase I premises has been perfected so as to constitute a good and marketable title, except for the exclusion therefrom of those lands mentioned in Clause 3F of this Mortgage; or

(3) Taxes or other charges assessed for the year 1971 need not be paid prior to December 31, 1971.

(b) The said Mortgagor, its successors and assigns, shall be obligated to fully pay and satisfy any and all tax indebtednesses, tax liens and tax claims, together with any and all interest and penalties thereon, now due and owing to the proper governmental authorities that touch and affect solely that portion of the mortgaged premises known as Phase II or any part thereof, being those lands not embraced within the premises described and set forth in the aforesaid Schedule "C" annexed hereto and made an express part hereof, at whichever following time or event occurs first: -

(1) Within 90 days after the title to all or part of Phase II premises has been perfected so as to constitute a good and marketable title, except for the exclusion therefrom of those lands mentioned in Clause 3F of this Mortgage, taxes will be paid on the land, title to which has been perfected.

(2) Taxes or other charges assessed for the year 1971 need not be paid prior to December 31, 1971.

(c) In the event that the said Mortgagor, C. J. Ahee, or a representative acting on his behalf (for purposes of this Subparagraph (c) the "Mortgagor") fully pay and satisfy the aforesaid tax indebtednesses, tax liens and tax claims mentioned in the preceding subparagraphs (a) and (b) hereof and as a part

Schedule "B" - Page 1 - Cont'd on Page 2

(D) Point along said centerline of water line along said boundary of a distance of 101 ft. on the distance of 143.31 ft. to the point of tangency of

thereof they receive and accept any assignment of any such tax indebtednesses, tax liens, tax claims or tax sale certificates, then the said Mortgagor does hereby agree for itself, its successors and assigns that if they are the holders of any of the same by way of assignment, that under no circumstances shall they have the right in any foreclosure proceeding or any other proceeding thereunder to join this Mortgagee, its successors or assigns as parties to any such proceedings and that the said Mortgagee, its successors and assigns shall have the right, amongst other remedies, to enjoin any such joinder and if this said Mortgagor, its successors or assigns, be not the holders of any of the same by way of assignment and instead, the holder of the same by way of assignment is some party or parties other than this Mortgagor, its successors or assigns, that then this said Mortgagor, its successors and assigns, shall, in the event of a foreclosure of such tax sale certificates, save harmless and indemnify the said Mortgagee, its successors and assigns, in regard to the principal indebtedness then due and owing hereunder, together with interest thereon and further, this said Mortgagor, its successors and assigns, shall be obligated to them and there fully pay and satisfy the entire principal indebtedness hereunder, together with interest thereon and the same shall be so notwithstanding anything in this indenture of Mortgage contained to the contrary.

(d) The said Mortgagor, its successors and assigns shall be obligated to fully pay, bond, or otherwise satisfy and have discharged and cancelled of record any and all judgments, mortgages, liens and encumbrances that now exist of record touching and affecting solely that portion of the mortgaged premises known as Phase I or any part thereof, being those lands more particularly described in and upon a certain Schedule "C" annexed hereto and made an express part hereof, at whichever following time or event occurs first: -

(1) Upon and simultaneous with the said Mortgagor, its successors or assigns, creating any new future mortgage involving these same mortgaged premises or any part thereof in a total amount not to exceed \$3,300,000.00; or

(2) Within 90 days after the title to all of the Phase I premises has been perfected so as to constitute a good and marketable title, except for the exclusion therefrom of those lands mentioned in Clause 3F of this Mortgage.

(e) The said Mortgagor, its successors and assigns, shall be obligated to fully pay, bond or otherwise satisfy and have discharged and cancelled of record any and all judgments, mortgages, liens and encumbrances that now exist of record touching and affecting solely that portion of the mortgaged premises known as Phase II or any part thereof, being those lands not embraced within the premises described and set forth in the aforesaid Schedule "C" annexed hereto and made an express part thereof, whichever following time or event occurs first: -

(1) Within 90 days after the title to all or part of Phase II premises has been perfected so as to constitute a good and marketable title, except for the exclusion therefrom of those lands mentioned in Clause 3F of this Mortgage, taxes will be paid on the land, title to which has been perfected.

Schedule B - Page 2 - Con't on Page 3

(15) shall along said centerline or wester line along said center line and have a width of 40 ft. on the distance of 313.71 ft. to the point of beginning of

(f) Upon each of the foregoing matters being satisfied, accomplished, paid or performed, then the said Mortgagor, its successors and assigns shall promptly thereafter furnish the Mortgagee, its successors and assigns, with written receipts and other valid proofs to evidence the same.

(g) In the event that the said Mortgagor, its successors and assigns shall fail, neglect or refuse for any cause or reason whatsoever to fully satisfy, accomplish, pay and perform each and all of the matters more particularly set forth in the preceding subparagraphs hereof, by the time or upon the occurrence of the therein specified event, with each such time or times and date or dates being deemed to be of the essence, then the same shall constitute an event of default hereunder and all of the rights and remedies of the said Mortgagee, its successors and assigns in the event of any such default shall be fully and totally applicable.

(II) Notwithstanding anything to the contrary contained either in said Indenture of Mortgage or the Note or obligation pertaining thereto or any Contract heretofore made between United Berkeley Realty Enterprises Corporation and others to and with Systec Corp., which said Contract was thereafter assigned by the said Systec Corp. to Bay Point Corp., it is expressly covenanted, understood and agreed by and between the said Mortgagor and the said Mortgagee as follows: -

(a) This mortgage shall be subordinate to any new future mortgage that may hereafter be created by the said Mortgagor involving these same mortgaged premises or any part thereof in a total amount not to exceed \$3,300,000.00 provided said mortgage is a first lien and there are no other liens (except bonded liens) prior in right to this mortgage and except taxes as herein stated.

(b) It is understood that with regard to any such aforesaid new future mortgage that may hereafter be created by the said Mortgagor involving any part of the mortgaged premises in a total amount not to exceed \$3,300,000.00, that the said Mortgagor would have set forth therein that it shall have the right to obtain releases of individual lots upon the payment of the greater of the sum of \$2,200.00 or such other amount required by first mortgagee per lot and it is agreed between the parties hereunder that in the event that the said new possible future mortgage does so provide, that then so long as said new such future mortgage may continue to be unpaid and unsatisfied as to the principal monies and interest then outstanding thereunder that the said Mortgagor shall also have the right to have released from the lien of this Mortgage without the requirement of the payment of any consideration therefor such same exact lots as it may then be having released from the lien of any such new aforesaid future mortgage, provided, however, that the release of said lots under any such new aforesaid future mortgage and the release of the same lots under this Mortgage shall both occur simultaneously, inclusive of the payment by the Mortgagor to any such holder of the new aforesaid future mortgage of the greater of the sum of \$2,200 or such other amount required by first mortgagee per lot so to be released and the new aforesaid future mortgage principal indebtedness from time to time outstanding shall be reduced by \$2,200.00 for each such released lot and the said Mortgagor shall furnish written receipts and other valid proofs to the Mortgagee, its successors and assigns, to evidence the same.

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Schedule B - Page 3 - Cont'd - Page 4

(15) still along said centerline of Veeder Lane along said curve to the left having a radius of 600 ft. an arc distance of 343.31 ft. to the point of tangency of said curve; thereon

Beginning at the point of intersection of the Southerly line of Ocean Gate Drive with the Southerly line of Louis Avenue, as shown on the map of "Berkeley Shore Estates, Section A, Berkeley Township, Ocean County, N.J.", filed in the Ocean County Clerk's Office October 25, 1957 as Map No. D-57 and running; thence

(1) Along said Southerly line of Louis Avenue South 78 deg 59 min 20 sec East 139.63 ft. to a point; thence

(2) along the westerly line of a map entitled "Plan of Ocean Gate, Ocean County, New Jersey, Section No. 4", filed in the Ocean County Clerk's Office August 2, 1912 as Map No. C-176, South 06 deg 00 min 40 sec West 853.25 ft. to a point in the northerly line of map of "Berkeley Shore Estates, Section A, Berkeley Township, Ocean County, New Jersey", filed in the Ocean County Clerk's Office October 25, 1957 as Map No. D-57; thence.

(3) along the northerly line of property of Berkeley Shore Estates and a line running parallel to and distant 100.00 ft. from the southerly line of Wieman Avenue as shown on Plans of Ocean Gate, Section No. 4 and Section No. 5 South 78 deg 59 min 20 sec East 3502.54 ft. to a point the Northwest corner of Lot 37 Block 197 as shown on hereinbeforementioned Plan of Ocean Gate, Section No. 4; thence

(4) along the westerly line of Lots 37 and 38 Block 197 South 11 deg 00 min 40 sec West 10.00 ft. to the southwest corner of Lot 38; thence

(5) along the southerly line of Lot 38 South 78 deg 59 min 20 sec East 100.00 ft. to a point in the westerly line of Stone Harbor Avenue as shown on said map, the Southeast corner of Lot 38; thence

(6) along said westerly line of Stone Harbor Avenue North 11 deg 00 min 40 sec East 10.00 ft. to a point, the northeast corner of Lot 37; thence

(7) along the northerly line of property of Berkeley Shore Estates and a line running parallel to and distant 100.00 ft. from the southerly line of Wieman Avenue South 78 deg 59 min 20 sec East 3400.00 ft. to a point; thence

(8) along a line running parallel to and distant 100.00 ft. easterly from the easterly line of Elberon Avenue as shown on Plan of Ocean Gate, Section No. 5, North 11 deg 00 min 40 sec East 850.00 ft. to a point in the southerly line of Louis Avenue; thence

(9) along said southerly line of Louis Avenue South 78 deg 59 min 20 sec East 303.25 ft. to its intersection with the southerly line of property formerly the Philadelphia and Long Branch Railroad; thence

(10) along said railroad line South 64 deg 10 min 20 sec East 2,145.36 ft. to its intersection with the centerline of Bayview Avenue (66 ft. wide), a County road; thence

(11) along said centerline of Bayview Avenue on a curve to the right having a radius of 77.64 ft. an arc distance of 860.35 ft. to the point of tangency of said curve; thence

(12) still along said centerline of Bayview Avenue South 80 deg 11 min 04 sec West 1,803.68 ft. to the point of curvature of a curve to the left having a radius of 885.16 ft; thence

(13) still along said centerline of Bayview Avenue along said curve to the left having a radius of 885.16 ft. an arc distance of 296.04 ft. to its intersection with the centerline of Veeder Lane as shown on "Final Map of Berkeley Shore Estates, Lagoon Section 5, Berkeley Township, Ocean County, N.J.", filed in the Ocean County Clerk's Office November 16, 1961 as Map No. E-101; thence

(14) along said centerline of Veeder Lane North 14 deg 14 min 46 sec West 396.32 ft. to the point of curvature of a curve to the left having a radius of 600 ft.; thence

(15) still along said centerline of Veeder Lane along said curve to the left having a radius of 600 ft. an arc distance of 343.31 ft. to the point of tangency of said curve; thence

- (16) still along said centerline of Veeder Lane North 77 deg 11 min 16 sec West 1,824.23 ft. to the point of curvature of a curve to the left having a radius of 1200 ft.; thence
- (17) still along said centerline of Veeder Lane along said curve to the left having a radius of 1200 ft. an arc distance of 297.36 ft. to the point of tangency of said curve; thence
- (18) still along said centerline of Veeder Lane South 83 deg 15 min 48 sec West 505.55 ft. to the point of curvature of a curve to the right having a radius of 600 ft.; thence
- (19) still along said centerline of Veeder Lane along said curve to the right having a radius of 600 ft. an arc distance of 217.94 ft. to the point of tangency of said curve; thence
- (20) still along said centerline of Veeder Lane North 70 deg 55 min 30 sec West 1,856.51 ft. to a point; thence
- (21) North 19 deg 04 min 30 sec East 10.00 ft. to a point; thence
- (22) along the centerline of Veeder Lane as shown on said map of Berkeley Shore Estates, Section A, North 70 deg 55 min 30 sec West 551.90 ft. to the point of curvature of a curve to the right having a radius of 383.34 ft.; thence
- (23) still along said centerline of Veeder Lane along said curve to the right having a radius of 383.34 ft. an arc distance of 299.54 ft. to its intersection with said southerly line of Ocean Gate Drive; thence
- (24) along said southerly line of Ocean Gate Drive along a curve to the left having a radius of 575.70 ft. an arc distance of 219.98 ft. to the point of tangency of said curve; thence
- (25) still along said southerly line of Ocean Gate Drive North 41 deg 49 min 45 sec East 2,591.81 ft. to the point and place of beginning.

Excepting thereout and therefrom any and all rights of the public in any road.

Excepting thereout and therefrom the following lots as shown on "Final Map of Berkeley Shore Estates, Section A, Berkeley Township, Ocean County, New Jersey" as filed in the Ocean County Clerk's office on October 25, 1957 as Map No. B-57, to wit:

Block 1	Lots 1 to 18 inclusive
Block 2	Lots 1 to 16 inclusive
Block 3	Lots 1 to 16 inclusive
Block 4	Lots 1 to 9 inclusive, 16 to 20 inclusive, 22, 23, 24 & 25
Block 5	Lots 1 to 17 inclusive
Block 6	Lots 1, 6 to 10 inclusive
Block 7	Lots 1 to 8 inclusive
Block 8	Lots 1 & 2
Block 9	Lots 1 & 2
Block 10	Lots 1 & 3
Block 14	Lots 1, 2, 3, 5 & 7.

Subject to a 25-foot drainage easement as shown on said map.

PARCEL II

All those certain lots as shown on "Final Map of Berkeley Shore Estates, Section C., Berkeley Township, Ocean County, New Jersey", filed in the Ocean County Clerk's Office on June 27, 1961, as Filed Map No. C-139.

Excepting thereat and therefrom the following lots as shown on said Map of Berkeley Shore Estates, Section C, Berkeley Township, Ocean County, New Jersey", to wit:

Block 88	Lots 3, 4, & 5
Block 89	Lots 1, 4, 6, 9, 10, 11, 13, 15, 17 to 21 inclusive
Block 90	Lots 1, 2, 3, 4, 5, 9, 11, 12, 15, 17, 19 to 24 inclusive.

PARCEL III

Beginning at the point of intersection of the Easterly line of Deal Avenue with the Southerly line of Veeder Lane as shown on "Final Map of Berkeley Shore Estate, Section C, Berkeley Township, Ocean County, New Jersey", filed in the Ocean County Clerk's Office on June 27, 1961, as Map No. C-139; thence

(1) along said easterly line of Deal Avenue along a curve to the left having a radius of 1250 ft., an arc distance of 696.93 ft. to its intersection with the southerly line of Ford Avenue as shown on said map; thence

(2) along said curve to the right having a radius of 1400 ft., an arc distance of 461.91 ft. to a point in the Westerly line of Moorage Avenue as shown on "Final Map of Berkeley Shore Estates, Section 5, Berkeley Township, Ocean County, New Jersey", filed in the Ocean County Clerk's Office on November 16, 1961 as Map No. B-161; thence

(3) along said Westerly line of Moorage Avenue North 29 deg 30 min 30 sec East 348.12 ft. to the point of curvature of a curve to the left having a radius of 275 ft.; thence

(4) still along said Westerly line of Moorage Avenue along said curve to the left having a radius of 275 ft. an arc distance of 91.63 ft. to the point of tangency of said curve; thence

(5) still along said Westerly line of Moorage Avenue North 10 deg 25 min 48 sec East 103.40 ft. to the point of curvature of a curve to the left having a radius of 30 ft.; thence

(6) along said curve to the left having a radius of 30 ft. an arc distance of 42.60 ft. to the point of tangency of said curve; thence

(7) along the Southerly line of Veeder Lane North 70 deg 55 min 30 sec West 657.41 ft. to the point and place of beginning.

PARCEL IV

All those certain lots as shown on "Map of Sloop Creek Estates, Lagoon Section A, Berkeley Township, Ocean County, New Jersey", filed in the Ocean County Clerk's Office on October 7, 1958, as filed Map No. C-422.

PARCEL V

All those certain lots as shown on "Map of Pebble Beach, Block 3, Lagoon Section B, Berkeley Township, Ocean County, New Jersey, filed in the Ocean County Clerk's Office on November 16, 1961, as filed Map No. 453.

PARCEL VI

All those certain lots as shown on "Map of Pebble Beach, property of Sloop Creek Estates, Blocks 4, 5 and 6, Lagoon Section B, Berkeley Township, Ocean County, New Jersey", filed in the Ocean County Clerk's Office on October 7, 1959, as filed Map No. E-286.

Excepting thereout and therefrom the following described premises:

Block 5 Lots 5, 7, 10 & 12, 21, 22, 23, 25 26, 27, 29 & 31 & 33.

PARCEL VII

All those certain lots as shown on "Map of Pebble Beach, property of Sloop Creek Estates, Blocks 7, 8 and 9, Lagoon Section B, Berkeley Township, Ocean County, New Jersey", filed in the Ocean County Clerk's Office on December 16, 1959, as Filed Map No. D-292.

Excepting thereout and therefrom the following described premises:

Block 8 Lots 14 to 19 inclusive
Block 9 Lots 1 to 27 inclusive.

REPUBLIC NATIONAL BANK OF NEW YORK
FIFTH AVENUE AT 40TH STREET
NEW YORK, N. Y. 10018

TELEPHONE: (212) 524-9000

CABLES: BLCBANK NEW YORK

TELEX 224967

July 7, 1971

Bay Point Corp.
c/o Bryant W. Griffin, Esq.
9 De Forest Avenue
Summit, New Jersey 07901

Attention: Mr. C. J. Achee, President

Dear Mr. Achee:

Reference is made to a Mortgage Indenture dated July 7, 1971, by and between Bay Point Corp., as Mortgagor, and United Berkeley Realty Enterprises Corporation, as Mortgagee, pertaining to certain premises located in Berkeley Township, Ocean County, New Jersey.

It is our understanding that under Paragraph 10 of the Mortgage the Mortgagor is entitled to certain credits against the principal amount of the Mortgage by reason of payments made pursuant to Paragraph 3 A, B, C and E. However, if, pursuant to Paragraph 3F of the Mortgage, an amount is determined as the fair price adjustment by reason of the Mortgagee's inability to convey marketable title as to a portion or portions of the mortgaged premises, the amount so determined may reduce the principal amount of the Mortgage to less than \$1,000,000.00.

It is our understanding that immediately upon closing of the new first mortgage in an amount not to exceed \$3,300,000.00 on the premises, title information current as of such time will be reviewed by us and the amount of \$1,000,000.00 provided for in Paragraph 10 of the Mortgage may be adjusted upwards by our mutual agreement.

REPUBLIC NATIONAL BANK OF NEW YORK

By *Ernest J. Gindling*

*Account Agreed
Bay Point Corp.
Bryant W. Griffin
Bay Point Corp.*

MEMBER FEDERAL DEPOSIT INSURANCE CORPORATION • FEDERAL RESERVE SYSTEM

Orig Bldg.

Exhibit IV II

A-37

KNOW ALL MEN BY THESE PRESENTS,

THAT on this 7th day of July, 1971, UNITED BERKELEY REALTY ENTERPRISES CORPORATION, a corporation of the State of New Jersey, Party of the First Part, in consideration of certain mutual promises by and between said Party of the First Part and REPUBLIC NATIONAL BANK OF NEW YORK, Party of the Second Part, and the sum of One (\$1.00) Dollar, lawful money of the United States of America, to it in hand paid by Republic National Bank of New York, a national banking association, Party of the Second Part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over and by these presents does grant, bargain, sell, assign, transfer and set over unto the said Party of the Second Part, its successors or assigns, a certain Indenture of Mortgage, bearing date the 7th day of July, 1971, made by Bay Point Corp., a New Jersey corporation, to the aforesaid United Berkeley Realty Enterprises Corporation, Party of the First Part, on lands in the Township of Berkeley, County of Ocean and State of New Jersey, in said Indenture of Mortgage more particularly described to secure the payment of the sum of Four Million Fifty Thousand (\$4,050,000.00) Dollars as in said Indenture of Mortgage stated and which Mortgage is about to be recorded simultaneously herewith in the Office of the Clerk of the County of Ocean and State of New Jersey.

TOGETHER with the Note or obligation described therein, and

Recorded
R+R - Republic Bank

the money due and to grow due thereon, together with such interest as therein set forth.

TO HAVE AND TO HOLD the same unto the said Party of the Second Part, Republic National Bank of New York, its successors or assigns forever subject only to the proviso in the said Indenture of Mortgage mentioned; AND it does hereby make, constitute and appoint the said Party of the Second Part its true and lawful attorney, irrevocable, in its name or otherwise but at its proper costs and charges, to have, use and take all lawful ways and means for the recovery of all the said money and interest; and in case of payment, to discharge the same as fully as it might or could do if these presents were not made. AND it does hereby covenant, promise and agree to and with the said Party of the Second Part, that there is now due and owing upon the said Note or obligation and Mortgage the original principal sum of Four Million Fifty Thousand (\$4,050,000.00) Dollars, ^{less credits provided for in the Mortgage} with interest to be computed thereon as in said Note and Indenture of Mortgage mentioned.

It is expressly understood and agreed that the within Assignment of said Note and Mortgage by said Party of the First Party to said Party of the Second Part and the receipt and acceptance of the same by said Party of the Second Part shall not be deemed to constitute any acceptance of the same by the said Party of the Second Part in satisfaction or partial satisfaction of any indebtedness or indebtednesses now due and owing or hereafter to grow due and owing to it by Master Trading Corp., Carver Corporation, Transcoastal Industries Corp.,

First-Net Corp. or United Technology Realty Enterprises Corporation or any of them or any of their affiliates or subsidiaries and instead, the said Party of the Second Part shall only be deemed to have received and accepted the same as security relative to any such indebtedness or indebtednesses now due and owing or to grow due and owing to said Party of the Second Part by each or all of said corporations, with the same being in addition to and not in substitution for any and all other forms and types of security presently held by the Party of the Second Part relative to such present and future indebtedness or indebtednesses and the receipt and acceptance of the same by the Party of the Second Part shall not be deemed to bar, prohibit, prevent or preclude said Party of the Second Part from proceeding or continuing to proceed or instituting any actions, suits or other enforcements pertaining to the satisfaction of any such indebtedness or indebtednesses from this security or any other security or otherwise and further, said Party of the First Part and said Party of the Second Part agree that the said Party of the First Part executes and delivers this Assignment of Note and Mortgage to Party of the Second Part and the said Party of the Second Part receives and accepts the same to be held and used by it pursuant to all of the terms and conditions set forth in a certain written Escrow Agreement - General Loan and Security Agreement made by and between said Party of the First Part and said Party of the Second Party and others on or about even date herewith.

IN WITNESS WHEREOF, the said Party of the First Part has

caused its corporate seal to be hereto affixed and attested by
its SECRETARY, and these presents to be signed by
its President, the day and year first above written.

UNITED BERKELEY REALTY
ENTERPRISES CORPORATION

ATTEST:

By *David C. [illegible]*

Arnold Smith

PREPARED BY:

ARNOLD SMITH, ESQ.

*Exhibit III*RECAPITULATION

Purchase Money Mortgage
United Berkeley Realty Enterprises Corp.

\$4,050,000.00

LESS: Schedule A	\$1,098,026.00
B	292,186.29
C	524,263.38
D	6,650.00
E	407,900.57
F	<u>3,652,834.60</u>

\$5,981,860.84

Balance Due on Purchase Money Mortgage

(\$1,931,860.84)

SCHEDULE A

	<u>Principal</u>	<u>Interest</u>	<u>Total</u>
Bond & Mortgage Co.	\$599,853.45	\$149,833.46	\$ 749,686.91
Inland Credit Corp.	200,000.00	66,044.77	266,044.77
Charles E. Villanueva	30,000.00	5,290.00	35,290.00
Edith N. Veeder, et al	37,650.00	9,354.32	47,004.32
			<u>\$1,098,026.00</u>

SCHEDULE B

Real Estate Taxes	\$278,970.91
Interest on money advanced by Bay Point Corp. to Purchase Tax Sale Certificates not included in the above	<u>13,215.38</u>
	<u>\$292,186.29</u>

SCHEDULE C

Franchise Taxes		\$ 30,209.03
Ocean County Sheriff's Office		603.26
Alfred L. Messano (past due bills of T.I.C.)		4,500.00
Riparian Grants		
Engineering to Date	\$ 3,750.00	
Legal to Date	1,010.00	
Filing Fees	250.00	
Estimated Costs of Grants	<u>250,000.00</u>	255,010.00 - ?
Budjan Investment Corp. - Judgment		46,400.00
First Jersey National Bank - Judgment		
Amount of Judgment	\$ 2,699.58	
Taxed Costs	<u>300.42</u>	3,000.00
U. S. Land & Utilities - Judgment		115,000.00
First National Bank of Toms River & Budjan Investment Corp.		40,000.00
Bond & Mortgage Co. - Judgment: Taxed Costs		5,091.39
Legal Fees:		
Bond & Mortgage Co.	\$ 6,800.00	
Inland Credit Corp.	9,359.70	
Charles E. Villanueva	500.00	
Edith N. Veeder, et al	4,750.00	
U. S. Land & Utilities	1,200.00	
First National Bank of T.R. & Budjan I.C.	300.00	
Bradford Pools	250.00	
Township of Berkeley	<u>900.00</u>	24,059.70
Miscellaneous disbursements: Recordings, etc.		<u>390.00</u>
		<u>\$524,263.38</u>

SCHEDULE D

Jerry Zohn - 133 Lots @ \$50.00	<u>\$ 6,650.00</u>
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SCHEDULE E

Bradford Pools - Judgment	\$ 22,420.00
Township of Berkeley - Judgment	363,406.35 -
Local Board of Health	12,500.00
Veeder Modification Agreement	<u>9 374.22</u>
	<u>\$407,900.57</u>

SCHEDULE F

<u>Parcel #</u>	<u>Description</u>	<u>Cost</u>	<u>Appraised Value Over Cost</u>
1	Shopping Center Site Block 1108 A-1, 13.46 Acres	-0-	\$ 269,200.00
2	Irving Hirsch Block 1108-85 Lots 1-40	\$ 63,395.35	146,604.65
3	A. J. Armstrong Lagoon Section 5	508,351.30	771,643.70
4.	Suburban Agency, Inc. Block 1244-A & 1244-B	-0-	216,000.00
5	Barton T. Coogle Block 1245 & 1246	155,752.34	349,247.66
6	First National Bank of Toms River Yacht Club Site Plus	119,614.87	250,385.13
7	Florence T. Allen Allen Tract	17,555.04	493,759.56
8	Inconenzi Block 1206-6 - 10.86 Acres.	-0-	130,320.00
		\$1,025,668.90	\$2,627,165.70
			<u>1,025,668.90</u>
	Total Appraised Value		<u>\$3,652,834.60</u>

SCHEDULE F-1

<u>Parcel #</u>	<u>Description</u>	<u>Cost</u>
2	Hirsch	
	Purchase Price	\$ 45,000.00
	Real Estat Tax	17,695.35
	Legal	600.00
	Disbursements	<u>100.00</u>
		\$ 63,395.35
3	Armstrong	
	Purchase Price	\$362,016.00
	Real Estate Tax	134,492.07
	Legal	11,012.90
	Disbursements	<u>820.33</u>
		508,351.30
5	Cogle	
	Purchase Price	\$ 97,586.83
	Real Estate Tax	56,505.51
	Legal	1,500.00
	Disbursements	<u>160.00</u>
		155,752.34
6	First National Bank	
	Purchase Price	116,000.00
	Real Estate Tax	1,790.87
	Legal	1,608.00
	Engineering	100.00
	Disbursements	<u>116.00</u>
		\$119,614.87
7.	Florence T. Allen	
	Purchase Price	\$158,923.51
	Real Estate Tax	17,639.13
	Legal	1,500.00
	Engineering	420.00
	Disbursements	<u>72.40</u>
		178,555.04
		<u>\$1,025,668.90</u>

Exhibit IV

MORTGAGE NOTE

A-47

\$4,050,000.00

July 7, 1971

FOR VALUE RECEIVED, the undersigned promises to pay to the order of UNITED BERKELEY REALTY ENTERPRISES CORPORATION (a New Jersey corporation) at Republic National Bank of New York, (a National Banking Association), 452 Fifth Avenue, New York, New York, the sum of FOUR MILLION FIFTY THOUSAND and 00/100 DOLLARS (\$4,050,000.00) with interest thereon at the rate of six percent (6%) per annum from June 29, 1973.

This note shall not carry interest from June 29, 1971 until June 29, 1973. Thereafter interest shall be payable quarterly, on the first day of each calendar quarter, commencing October 1, 1973. This note shall become due on June 29, 1976.

1. As security for the payment of the monies evidenced by this note, the undersigned has delivered to United Berkeley Realty Enterprises Corporation a mortgage bearing even date herewith and about to be recorded, covering lands in the Township of Berkeley, County of Ocean and State of New Jersey, in the principal sum of FOUR MILLION FIFTY THOUSAND and 00/100 DOLLARS (\$4,050,000.00). The provisions of this mortgage are incorporated herein by reference. All provisions, including but not limited to provision for adjustment in the principal amount hereof, shall have the same effect as though set forth herein.

2. Notwithstanding the foregoing, the unpaid balance of the principal sum of this note and interest thereon shall immediately become due and payable, at the election of the holder hereof, in the event of:

A. Thirty days' default in any payment due hereunder, or
B. Ninety days after the filing of a petition against the undersigned or the owner of such mortgaged property for relief under any bankruptcy or insolvency law or the appointment of a Receiver of the property or any part thereof, or of the undersigned or of the owner of such mortgaged property, if such petition has not been dismissed or such Receiver relieved within such 90-day period; or

C. The filing of a petition by the undersigned or the owner of such mortgaged property for relief under any bankruptcy or insolvency law; or

D. An assignment by the undersigned or the owner of the mortgaged property of assets for the benefit of creditors; or

E. Any default in the covenants and conditions of the mortgage securing this note.

3. The undersigned and all other parties who at any time may be liable hereon in any capacity, jointly and severally, waive presentment, demand for payment, protest and notice of dishonor of this note, and authorize the holder hereof, without notice, to grant extensions in the time of payment of and reductions in the rate of interest on any moneys owing on this note.

BAY POINT CORP.

By

President

ATTEST:

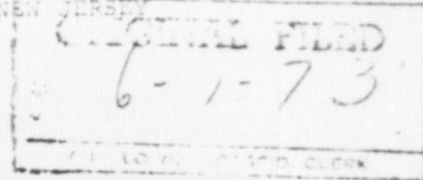
Secretary

As to Phase I and as to Phase II after good and marketable title exists,

Orig Encl
Linsberg

DOCKETED
DOCKETED
E. Moore 7/16/73

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY



A-48

BAY POINT CORPORATION,	:	
Plaintiff,	:	CIVIL ACTION
vs.	:	No. 592-73
REPUBLIC NATIONAL BANK	:	
OF NEW YORK,	:	ORDER FOR TRANSFER
Defendant.	:	

This matter was before the Court on the adjourned return date of an Order to Show Cause previously entered herein, and also upon the return date of a Motion filed by Defendant herein on May 25, 1973, to transfer the within action upon the grounds that Plaintiff had improperly laid venue in this action in the District of New Jersey. As more fully set forth in an oral opinion delivered by this Court, it is the decision of this Court that venue in this action should have been laid by Plaintiff in the United States District Court for the Southern District of New York, pursuant to 12 U.S.C. § 94. Therefore:

It is on this day of May, 1973, ORDERED that this action is transferred to the United States District Court for the Southern District of New York and the Clerk of this Court shall forthwith deliver all of the papers and other materials filed herein to the Clerk of the United States District Court for the Southern District of New York, and defendant shall have 10 days from the date of this order to respond to the complaint except if such time is extended further by the transferee Court.

Frederick B. Lacey

FREDERICK B. LACEY, Judge
United States District Court
for the District of New Jersey

CONSENTED TO AS TO FORM:

HERMAN E. COOPER
Attorney for Defendant

Herman E. Cooper by [signature]

MOSER, GRIFFIN, KERBY & COOPER
Attorneys for Plaintiff

By *[signature]*
ROBERT F. SCHAUL

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BAY POINT CORP.,)	
	:	
)	
Plaintiff)	CIVIL ACTION NO. 73-C-2549
	:	
- vs -)	ANSWER
	:	
REPUBLIC NATIONAL)	
BANK OF NEW YORK,	:	
)	
Defendant)	
	:	
)	

The defendant, by its attorney HERMAN E. COOPER, answering the complaint herein respectfully alleges:

1. The defendant now and at all times hereafter saves and reserves unto itself all defenses, exceptions and motions to which it might be entitled based upon the complaint herein, its wording and/or the facts:

2. Denies on failure to have information sufficient to form a belief as to the allegations in the complaint herein that:

- (a) plaintiff is a corporation, and to each and every allegation set forth in paragraph number "1" under "JURISDICTION";
- (b) plaintiff owns certain realty, and to each and every allegation set forth in paragraph number "1" of the "FIRST COUNT;"

- (c) plaintiff executed and delivered a mortgage to a third party as alleged in paragraph numbered "2" of the "FIRST COUNT," but does admit knowledge of a mortgage wherein a "Bay Point Corp." is the mortgagor and a "United Berkeley Realty Enterprises Corporation" ("United Berkeley") is the mortgagee;
- (d) the third party assigned the mortgage referred to in paragraph numbered "3" of the "FIRST COUNT" but does admit that a United Berkeley did assign certain rights under a mortgage to the defendant,
- (e) the interpretation by plaintiff of Exhibit I annexed to the complaint, and events related thereto, is correct as set forth in paragraphs numbered "4" and "5" of the "FIRST COUNT";
- (f) plaintiff is under contract with a third party, and each and every allegation contained in paragraph numbered "4" of the "SECOND COUNT";
- (g) plaintiff may be forced into a default under a contract with a third party, as set forth in paragraph numbered "5" of the "SECOND COUNT";
- (h) plaintiff has a commitment for a mortgage, and to each and every allegation set forth in paragraph numbered "6" of the "SECOND COUNT";
- (i) plaintiff has a belief concerning defendant's course of conduct, and to each and every allegation set forth in paragraph numbered "7" of the "SECOND COUNT";

- (j) plaintiff acquired certain realty subsequent to title closing, and to each and every allegation set forth in paragraph numbered "3" of the "FOURTH COUNT";
- (k) the mortgage referred to in paragraph "2" of the "FOURTH COUNT" is relevant;
- (l) the description in the deed and mortgage included tracts of land to which United Berkeley did not have title, and to each and every allegation contained in paragraph numbered "4" of the "FOURTH COUNT";
- (m) the mortgage does not cover realty claimed to be after acquired, and to each and every allegation contained in paragraph numbered "5" of the "FOURTH COUNT";
- (n) plaintiff does not wish to be in default, and to each and every allegation contained in paragraph numbered "3" of the "FIFTH COUNT."

3. Denies each and every allegation contained in paragraphs of the complaint herein as follows:

- (a) under JURISDICTION, paragraph numbered "4";
- (b) under the FIRST COUNT, paragraph numbered "6";
- (c) under the SECOND COUNT, that defendant is required to deliver releases to plaintiff as alleged in paragraph numbered "4";
- (d) under the SECOND COUNT, that defendant is aware of all facts or is seeking to extract unwarranted economic concessions from plaintiff, as alleged in paragraphs unbered "2" and "3";
- (e) under the THIRD COUNT, paragraphs numbered "2" and "3."

4. Denies each and every allegation contained in paragraphs of the complaint herein, as previously admitted or denied in those paragraphs numbered "1" under the SECOND, THIRD, FOURTH and FIFTH COUNTS.

As and for a FIRST AFFIRMATIVE DEFENSE, defendant alleges:

1. The amount in controversy, exclusive of interest and costs, does not exceed \$10,000.00.

As and for a SECOND AFFIRMATIVE DEFENSE, defendant alleges:

1. The mortgage annexed as Exhibit I to the complaint is between plaintiff as mortgagor and United Berkeley Realty Enterprises Corporation ("United Berkeley") as mortgagee.

2. The relief sought by plaintiff in the SECOND COUNT of the complaint seeks the specific performance of certain obligations contained in the provisions of said mortgage.

3. The defendant is the assignee of certain limited rights of United Berkeley under said mortgage.

4. United Berkeley is an indispensable party who must be joined in this proceeding for the relief sought by plaintiff under the SECOND COUNT.

As and for a THIRD AFFIRMATIVE DEFENSE, defendant alleges:

1. Defendant repeats and realleges paragraphs "1," "2" and "3" of the Second Affirmative Defense as though fully set forth herein at length.

2. The relief sought by plaintiff under the FIRST, SECOND, THIRD, FOURTH and FIFTH COUNTS of the Complaint herein adversely affects obligations and interests of the mortgagee, United Berkeley, as distinguished from defendant.

3. The grant of the complete relief sought by plaintiff under the aforesaid Counts cannot be accorded among those already parties in the absence of United Berkeley and may as a practical matter impair or impede the interest of United Berkeley;

4. Absent joinder of United Berkeley in these actions, the ability of United Berkeley to protect its interest will be impaired or impeded as related to the mortgage and subject of these actions.

5. Unless United Berkeley is joined as a party defendant, the defendant Republic National Bank of New York will be subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the interest of United Berkeley herein.

6. Joinder of United Berkeley as a party defendant is required for a just adjudication of the within actions.

7. Plaintiff is not entitled to proceed against the named defendant for the relief sought by the complaint.

As and for a FOURTH AFFIRMATIVE DEFENSE defendant alleges:

1. The written assignment of rights by United Berkeley to defendant under the mortgage to United Berkeley by plaintiff is, in accordance with and limited by the provisions of said assignment (Exhibit II attached to Complaint).

2. The said assignment is subject to an "Escrow Agreement -- General Loan and Security Agreement" between United Berkeley, the defendant and others.

3. The aforesaid "Escrow Agreement -- General Loan and Security Agreement" provides that the defendant is authorized and directed to execute releases of lien provided in said mortgage only upon delivery to and receipt by the defendant of cash proceeds under the mortgage.

4. By reason of the aforesaid limitations upon defendant as assignee, plaintiff is without recourse against the defendant for the releases demanded by specific performance under the SECOND COUNT, except as aforesaid.

5. The plaintiff has heretofore not made any cash payments to defendant of mortgage proceeds so as to be entitled to the releases demanded.

As and for a FIFTH AFFIRMATIVE DEFENSE, defendant alleges:

1. The defendant accepted an assignment of certain rights under the mortgage given by plaintiff to United Berkeley in reliance upon representations by plaintiff and United Berkeley that title to the realty described in said mortgage and the deed of conveyance by United Berkeley to plaintiff was free and clear of any defect in title.

2. The defendant delayed in asserting rights against United Berkeley and plaintiff in reliance upon representation by plaintiff and United Berkeley that all the realty described in said mortgage and deed was being conveyed and encumbered by said mortgage.

3. The plaintiff knew or should have known that not all the described realty so conveyed and encumbered was being so conveyed and encumbered free and clear of any cloud on title.

4. The plaintiff wholly failed and neglected to inform defendant that not all the realty being conveyed and encumbered was free and clear of any cloud on title.

5. The plaintiff is estopped from asserting any claim that all of the realty described therein is not encumbered by the said mortgage.

WHEREFORE defendant demands judgment dismissing the complaint herein, together with costs and disbursements.

Dated: June 9th 1973

HERMAN E. COOPER
Attorney for Defendant

by Herman E. Cooper
500 Fifth Avenue
New York, N. Y., 10036
(212) 354-1520

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BAY POINT CORP. ,

Plaintiff,

- vs -

REPUBLIC NATIONAL
BANK OF NEW YORK,

Defendant.

CIVIL ACTION NO. 73-C-2549

AMENDED ANSWER

DOCS 57
C Moore 6/28/73

The defendant, by its attorney HERMAN E. COOPER, by its amended answer to the complaint herein respectfully alleges:

1. The defendant now and at all times hereafter saves and reserves unto itself all defenses, exceptions and motions to which it might be entitled based upon the complaint herein, its wording and/or the facts:

2. Denies on failure to have information sufficient to form a belief as to the allegations in the complaint herein that:

(a) plaintiff is a corporation, and to each and every allegation set forth in paragraph number "1" under "JURISDICTION";

(b) plaintiff owns certain realty, and to each and every allegation set forth in paragraph number "1" of the "FIRST COUNT";

(c) plaintiff executed and delivered a mortgage to a third party as alleged in paragraph numbered "2" of the "FIRST COUNT", but does admit knowledge of a mortgage wherein a "Bay Point

Corp.' is the mortgagor and a "United Berkeley Realty Enterprises Corporation" ("United Berkeley") is the mortgagee;

- (d) the third party assigned the mortgage referred to in paragraph numbered "3" of the "FIRST COUNT" but does admit that a United Berkeley did assign certain rights under a mortgage to the defendant,
- (e) the interpretation by plaintiff of Exhibit I annexed to the complaint, and events related thereto, is correct as set forth in paragraphs numbered "4" and "5" of the "FIRST COUNT";
- (f) plaintiff is under contract with a third party, and each and every allegation contained in paragraph numbered "4" of the "SECOND COUNT";
- (g) plaintiff may be forced into a default under a contract with a third party, as set forth in paragraph numbered "5" of the "SECOND COUNT";
- (h) plaintiff has a commitment for a mortgage, and to each and every allegation set forth in paragraph numbered "6" of the "SECOND COUNT";
- (i) plaintiff has a belief concerning defendant's course of conduct, and to each and every allegation set forth in paragraph numbered "7" of the "SECOND COUNT";

- (j) Plaintiff acquired certain realty subsequent to title closing, and to each and every allegation set forth in paragraph numbered "3" of the "FOURTH COUNT";
- (k) the mortgage referred to in paragraph "2" of the "FOURTH COUNT" is relevant;
- (l) the description in the deed and mortgage included tracts of land to which United Berkeley did not have title, and to each and every allegation contained in paragraph numbered "4" of the "FOURTH COUNT";
- (m) the mortgage does not cover realty claimed to be after acquired, and to each and every allegation contained in paragraph numbered "5" of the "FOURTH COUNT";
- (n) plaintiff does not wish to be in default, and to each and every allegation contained in paragraph numbered "3" of the "FIFTH COUNT".

3. Denies each and every allegation contained in paragraphs of the complaint herein as follows:

- (a) under JURISDICTION, paragraph numbered "4";
- (b) under the FIRST COUNT, paragraph numbered "6";
- (c) under the SECOND COUNT, that defendant is required to deliver releases to plaintiff as alleged in paragraph numbered "4";
- (d) under the SECOND COUNT, that defendant is aware of all facts or is seeking to extract

unwarranted economic concessions from plaintiff, as alleged in paragraphs numbered "2" and "3";

(c) under the THIRD COUNT, paragraphs numbered "2" and "3".

4. Denies each and every allegation contained in paragraphs of the complaint herein, as previously admitted or denied in those paragraphs numbered "1" under the SECOND, THIRD, FOURTH and FIFTH COUNTS.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

5. The plaintiff purchased the lands and premises described in the Deed from United Berkeley to the plaintiff, executed and acknowledged July 7, 1971 and duly recorded on July 8, 1971 in the Ocean County Clerk's Office, Ocean County, New Jersey.

6. Upon such purchase, and in consideration therefor, the plaintiff executed and delivered to United Berkeley a note, secured by a mortgage on all the land and premises described in the aforesaid deed, in the sum of \$4,050,000.00, which mortgage is dated July 7, 1971 and was duly recorded on July 7, 1971 in the Ocean County Clerk's Office, Ocean County, New Jersey, in Book 1621 of Mortgages at Page 77.

7. By a written instrument made and dated July 7, 1971, United Berkeley, with the knowledge and approval of plaintiff, duly assigned to defendant the aforesaid Note with certain rights under the Indenture of Mortgage as security for an existing indebtedness then due and owing or to grow due and owing by United Berkeley to defendant by its terms, which Assignment was duly recorded on July 8, 1971 in the Ocean County Clerk's Office, Ocean County, New Jersey, in Book 154, Page 708.

8. The defendant at the instance of plaintiff and United Berkeley, accepted said assignment as an inducement to discharge a prior *lis pendens* duly recorded by defendant upon the land and premises about to be conveyed and mortgaged as aforesaid.

9. Thereafter, and in or about October, 1972, the plaintiff by an instrument in writing titled "Release of Mortgaged Premises" prepared by its attorney, BRYANT W. GRIFFIN, ESQ., submitted same to, requested and procured the releases by defendant to plaintiff from the lien of the aforesaid mortgage on certain of the aforesaid lands and premises with the condition that the residue of the lands and premises described in the said mortgage remain as security for the payment of the money remaining due thereunder and the performance of the covenants and conditions therein contained.

10. By reason of the foregoing, the plaintiff is estopped by deed, the Deed transferring title and the Indenture of Mortgage thereunder, and by the performance thereof and thereunder, from denying or disclaiming title in all the land and premises described therein as of the execution and delivery of the aforesaid mortgage upon all the land and premises described in the aforesaid Deed and Indenture of Mortgage or that defendant as assignee of said mortgage succeeded to the rights of its assignor thereunder by the terms of said Assignment.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

11. Defendant repeats and realleges each and every allegation set forth in paragraphs "5" through "9" inclusive as though fully herein set forth at length.

12. Upon information and belief, the plaintiff thereafter

allegedly acquired clear title from others to certain of the same land and premises as described in the aforesaid Deed and Indenture of Mortgage which certain land and premises plaintiff now alleges United Berkeley was not seized of and could not convey clear title by the aforesaid Deed of July, 1971.

13. The plaintiff, as grantee, by acceptance of the aforesaid Deed and by recordation thereof as aforementioned, had actual notice and knowledge of and adopted the description therein contained of the land and premises so being conveyed by United Berkeley upon all of which plaintiff executed the aforesaid mortgage to United Berkeley, assignor of defendant, including any such land and premises contained within said description and since claimed by plaintiff to be excluded from the lien of the mortgage.

14. By reason of the foregoing, plaintiff is estopped by record and the acts of recordation of the aforesaid Deed, the Indenture of Mortgage and the Assignment thereof, from denying or disclaiming the truth of the matters as they appear in the aforementioned instruments as recorded in the Ocean County Clerk's Office, Ocean County, New Jersey, including the land and premises as described in and by said duly recorded instruments.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

15. The amount in controversy, exclusive of interest and costs, does not exceed \$ 10,000.00.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

16. The mortgage annexed as Exhibit I to the complaint is

between plaintiff as mortgagor and United Berkeley as mortgagee.

17. The relief sought by plaintiff in the SECOND COUNT of the complaint seeks the specific performance of certain obligations contained in the provisions of said mortgage.

18. The defendant is the assignee of certain limited rights of United Berkeley under said mortgage and by the terms of the Assignment to defendant, and United Berkeley would be adversely affected by the grant of relief to plaintiff herein sought so that complete relief cannot be accorded by defendant to plaintiff even if entitled thereto unless United Berkeley is made a party thereto.

19. By reason of the foregoing, United Berkeley is and indispensable party who must be joined in this proceeding for the relief sought by plaintiff under the SECOND COUNT.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

20. Defendant repeats and realleges paragraphs "6", "7" and "8" of the Second Affirmative Defense as though fully set forth herein at length.

21. The relief sought by plaintiff under the FIRST, SECOND, THIRD, FOURTH and FIFTH COUNTS of the complaint herein adversely affects obligations and interests of the mortgagee, United Berkeley, as distinguished from defendant.

22. The grant of the complete relief sought by plaintiff under the aforesaid Counts cannot be accorded among those already parties in the absence of United Berkeley and may as a practical matter impair or impede the interest of United Berkeley;

23. Absent joinder of United Berkeley in these actions, the ability of United Berkeley to protect its interest will be impaired or impeded as related to the mortgage and subject of these actions.

24. Unless United Berkeley is joined as a party defendant, the defendant REPUBLIC NATIONAL BANK OF NEW YORK, will be subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the interest of United Berkeley herein.

25. Joinder of United Berkeley as a party defendant is required for a just adjudication of the within actions.

26. By reason of the foregoing, plaintiff is not entitled to proceed against the named defendant for the relief sought by the complaint unless United Berkeley is joined as a party defendant.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

27. The written assignment of rights by United Berkeley to defendant under the mortgage to United Berkeley by plaintiff is in accordance with and limited by the provisions of said assignment (Exhibit II attached to complaint).

28. The said assignment is subject to an "Escrow Agreement -- General Loan and Security Agreement" between United Berkeley, the defendant and others.

29. The aforesaid "Escrow Agreement -- General Loan and Security Agreement" provides that the defendant is authorized and directed to execute releases of lien provided in said mortgage only upon delivery to and receipt by the defendant of cash proceeds under the mortgage.

30. The plaintiff has heretofore not made any cash payments to defendant of mortgage proceeds so as to be entitled to the releases demanded.

31. By reason of the aforesaid limitations upon defendant as assignee, plaintiff is without recourse against the defendant for

the releases demanded by specific performance under the SECOND COUNT, except as aforesaid.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

32. *The defendant accepted an assignment of certain rights under the mortgage given by plaintiff to United Berkeley in reliance upon a warranty deed to plaintiff from United Berkeley that title to the realty described in the deed of conveyance by United Berkeley to plaintiff was free and clear of any defect in title.*

33. *The defendant delayed in asserting rights against United Berkeley and plaintiff in reliance upon representation by plaintiff and United Berkeley by the Deed and Indenture and Mortgage that all the realty described in said mortgage and deed was being conveyed and encumbered by said mortgage.*

34. *Prior to defendant's withdrawal of the lis pendens and acceptance of the assignment under the mortgage the plaintiff was under a duty to but failed and neglected to disclose to defendant a reservation that the realty being conveyed and encumbered was not free and clear of any cloud on title.*

35. *By reason of the foregoing, the plaintiff is estopped from denying or asserting any contrary claim that all of the realty described in the deed by which plaintiff acquired title is encumbered by the said mortgage.*

WHEREFORE defendant demands judgment dismissing the complaint herein, together with costs and disbursements.

Dated: June 26, 1973

HERMAN E. COOPER
Attorney for Defendant

by Herman E. Cooper
500 Fifth Avenue,
New York, N. Y., 10036
(212) 354 - 1520

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A-56

-----X
:
Bay Point Corp. :

73 Civ. 2549

v. :

Docket No.

Republic Nat'l Bank of N.Y. :

-----X
:
SUPPLEMENTAL PLEADING

Plaintiff, Bay Point Corp., supplementing its complaint previously filed in this action, says:

FIRST COUNT

1. Plaintiff incorporates herein, by reference, all of the allegations contained in paragraphs one through six of the first count of the complaint.

2. As stated in paragraph five of the first count of the complaint, on March 19, 1973, plaintiff served a written notice upon defendant's attorney designating an appraiser for the purpose of computing the "fair price adjustment" provided for in paragraph 3f of exhibit one to the complaint. Defendant never responded to that notice and never designated an appraiser of its own. Therefore, following the procedures set forth in the mortgage, the appraiser so appointed by plaintiff appointed a second appraiser to serve with him. While plaintiff has not received the formal written appraisal prepared by the two appraisers, it is plaintiff's understanding and belief that the formal appraisal, when submitted, will show that the amount of

the "fair price adjustment" exceeds any amount which otherwise would be due under the mortgage.

WHEREFORE, plaintiff requests judgment from this Court on count one of the complaint:

- A. Fixing and determining the amount owed to the defendant by plaintiff, if any;
- B. Enforcing the decision of the arbitrators rendered pursuant to the procedures set forth in the mortgage;
- C. Such other relief as the Court may deem equitable and just, and
- D. For costs.

SECOND COUNT

1. Plaintiff incorporates herein all of the allegations contained in the second count of the complaint, together with all allegations incorporated therein by reference, and further incorporates herein all of the supplemental allegations relating to the first count of the complaint, which are contained in this supplemental pleading.

2. Subsequent to the filing of the complaint herein, defendant delivered to plaintiff's contract purchaser the twenty-two releases of lots from the lien of the mortgage held by defendant which are referred to in this count of the complaint. It is the understanding of the plaintiff that defendant required plaintiff's contract purchaser, the Mayer Corporation, to pay to defendant the sum of \$50,000.00 in order to obtain those releases. Defendant had no legal right or authority to demand any such payment from the Mayer Corporation, as plaintiff had complied with all of the requirements of the mortgage for obtaining the necessary releases. To the extent that plaintiff received a y

such moneys from the Mayer Corporation, it was unjustly enriched as a result of its breach of its contract with plaintiff.

3. Subsequent to the delivery by the defendant of the aforesaid releases to the Mayer Corporation, the Mayer Corporation instituted suit against plaintiff in the Superior Court of New Jersey for breach of its contract to sell land to Mayer. The basis for the suit against plaintiff is that plaintiff was unable to convey lots to Mayer, free and clear of the lien of the mortgage held by defendant, as required in that contract.

WHEREFORE, plaintiff requests judgment from this Court on this count as follows:

A. For an order directing and compelling defendant to deliver to plaintiff releases of lots from the lien of defendant's mortgage upon payment by plaintiff to the first mortgagee on account of principal of the sum of \$2,200.00 per lot, in accordance with the provision of schedule B, paragraph II(b) of the mortgage between plaintiff and defendant.

B. For such other relief as the Court may deem to be equitable and just.

C. For costs.

THIRD COUNT

1. Plaintiff incorporates herein by reference all of the allegations contained in the third count of the complaint previously filed herein, as well as all allegations incorporated therein by reference, and further incorporates herein by reference all of the allegations heretofore contained in this supplemental pleading.

2. In paragraph six of the second count of this complaint incorporated herein by reference, it was alleged that plaintiffs

had obtained a firm written mortgage commitment from Chase Manhattan Bank for the sum of \$5,000,000.00. The only obstacle to closing this borrowing was the necessity of obtaining releases from defendant upon paying the sum of \$2,200.00 per lot to the first mortgagee. Subsequent to the filing of the complaint, and as a direct result of plaintiff's inability to obtain releases from defendant, this mortgage commitment was terminated by Chase Manhattan. As a result of this termination, plaintiff was not only deprived of the means of proceeding with the development of plaintiff's property, but plaintiff also, under the terms of the commitment, was required to pay various fees, costs, and charges to Chase Manhattan and its attorneys in an approximate amount of \$25,000.00. In addition, the mortgage broker who obtained the Chase Manhattan commitment for plaintiff has claimed that plaintiff owes him a \$25,000.00 fee for having obtained the commitment. While plaintiff has denied any such liability to the broker, the dispute is presently in arbitration under the auspices of the American Arbitration Association and plaintiff may be held liable to the mortgage broker.

3. The net effect of defendant's refusal to provide the releases called for under the mortgage and to comply with the mortgage provisions for establishing the amount due under the mortgage, if any, has been to put plaintiffs out of business for a period of approximately a year. Plaintiff is in the business of selling land. Because of defendant's refusal to comply with the mortgage contract, plaintiff has had nothing to sell. In addition, plaintiff continues to be liable for interest on mortgages, for real estate taxes, and for other fixed, continuing charges. Furthermore, plaintiff is being sued by the Mayer Corporation for breach of its contract to sell to the Mayer

Corporation various parcels of real estate, which plaintiff has been unable to convey because of defendant's actions, and plaintiff is also being sued by one Laird Associates, a junior mortgage holder, for foreclosure of the mortgage held by it. Laird is alleging default by plaintiff because of failure to pay real estate taxes. Plaintiff has failed to pay some of the real estate taxes on the property, because plaintiff's inability to transact business, resulting from defendant's refusal to comply with the terms of its mortgage, has prevented plaintiff from having an adequate cash flow to discharge these obligations.

WHEREFORE, plaintiff requests judgment of this Court, on this count, as follows:

- A. For damages, both compensatory and punitive.
- B. For such other relief as the Court may deem to be just and equitable.
- C. For costs.

FOURTH COUNT

1. Plaintiff incorporates herein, by reference, all of the matter pleaded in the fourth count of the original complaint together with incorporating herein all of the supplemental allegations contained in this supplemental pleading.

WHEREFORE, plaintiff requests judgment of this Court as specified in the complaint.

FIFTH COUNT

1. Plaintiff incorporates herein, by reference, all of the matter pleaded in the fifth count of the original complaint, together with incorporating herein by reference all of the supplemental allegations contained herein.

WHEREFORE, plaintiff requests judgment of this Court
as specified in the original complaint.

PATTERSON, BELKNAP & WEBB
Attorneys for Plaintiff

By: Richard A. Johnson
A Member of the Firm
1 Wall Street
New York, New York

Dated: February 5, 1974.

FILED 23

2017

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BAY POINT CORP.,

Plaintiff,

- vs -

REPUBLIC NATIONAL BANK
OF NEW YORK,

Defendant.

CIVIL ACTION NO. 73-C-2519

DEFENDANT'S ANSWER AND
COUNTERCLAIM TO
PLAINTIFF'S SUPPLEMENTAL
COMPLAINT

Defendant, Republic National Bank of New York, for
its answer to the plaintiff's supplemental complaint herein, respectfully
alleges:

1. Repeats, reaffirms and incorporates herein by
reference each and every allegation, denial and affirmative defense
pleaded by defendant's amended answer as though each paragraph thereof
were fully set out herein, and further hereby denies each and every
allegation set forth in plaintiff's supplemental complaint.

FIRST DEFENSE

2. The separate mortgages held by defendant and
Laird Associates, Inc. ("Laird") obliged the plaintiff as mortgagor to
pay taxes assessed against the mortgaged premises described therein
under any existing or future law, before the same or any part thereof or
installment thereon, shall become delinquent, and to exhibit receipts for

the payments thereof to said mortgages within six months at the time same should become due.

3. The plaintiff, as mortgagor, defaulted in payment of real estate taxes on the mortgaged premises due and payable on February 1, 1972; May 1, 1972; August 1, 1972; November 1, 1972; February 1, 1973; and thereafter, and failed, refused and neglected to produce or otherwise exhibit receipts for payment of said taxes as required by the aforesaid mortgages.

4. The default and failure of the plaintiff to pay the aforementioned real estate taxes, due and payable since February 1, 1972 on the mortgaged premises, caused Laird, holder of a junior mortgage of Four Hundred fifty thousand (\$450,000) Dollars thereon, to elect under its mortgage and note that the entire unpaid principal sum become due.

5. Upon failure of plaintiff to cure said default by payment of said real estate tax arrears or to make payment of said principal sum recited by its mortgage, Laird commenced a mortgage foreclosure proceeding in the Superior Court of New Jersey, Chancery Division, Ocean County, under Docket No. F-104-73, against plaintiff as mortgagor and this defendant, Republic National Bank of New York, among other lienors, as defendants, with jurisdiction thereby over the subject matter and parties thereto vested exclusively in the Superior Court of New Jersey.

6. In and to the aforesaid mortgage foreclosure proceeding, Laird, as plaintiff, demands judgment, inter alia "bearing and foreclosing the defendants of all equity of redemption in and to said lands and premises" and "adjudging that said lands be sold according to

law to satisfy the amount due plaintiff".

7. By reason of the foregoing, plaintiff is barred from and should be denied the relief sought from this Court by the First Count of its supplemental complaint in that the effect of the aforesaid mortgage foreclosure action by Laird was to vest exclusive jurisdiction in the Superior Court of New Jersey to fix and determine the amount owed to the defendant by plaintiff, under defendant's mortgage.

SECOND DEFENSE

8. Prior to and since demand by plaintiff of defendant for releases of its mortgage lien upon certain twenty-two (22) lots contained within the mortgaged premises, plaintiff was not in compliance with the prerequisites of the terms and conditions of the mortgage, and was in breach of its obligations under the defendant's mortgage, having impaired defendant's security by default in payment of past due real estate taxes, causing a mortgage foreclosure, and by committing wrongful diversion and conversion of funds, property and interests as to diminish and defeat defendant's rights under the mortgage, and by fraudulently inducing a sales contract with The Mayer Corporation ("Mayer") for sale of 150 lots, including the aforesaid 22 lots, within the mortgaged premises, and committing fraudulent acts in connection therewith, so as to cause a lawsuit by Mayer against plaintiff for damages therefor and consequent curtailment of the marketability of the mortgaged premises by reason thereof.

9. Defendant did provide said releases to Mayer, purchaser of the said lots, whereby the closing and transfer of title from plaintiff to Mayer of the 22 lots was effected as contracted between them, with no damage or injury to plaintiff by reason thereof.

10. Defendant was and is ready to provide the certain additional releases to Mayer, as purchaser of said lots and pursuant to a separate agreement providing therefor, at a closing and transfer of title between plaintiff and Mayer covering said additional lots contained within the mortgaged premises.

11. Defendant was informed and believes that such scheduled closing between plaintiff and Mayer, under a contract of sale between them, did not take place by reason, among others, of the refusal of the first mortgagee, FMI, similarly to provide releases of its first mortgage lien against the aforesaid additional lots, which releases by FMI were an indispensable and unperformed prerequisite condition to transfer of clear title from plaintiff to Mayer, so that defendant was not preliminarily obliged to do so and plaintiff was not damaged or injured by any refusal of defendant to provide the aforesaid releases.

12. By reason of the foregoing, the plaintiff suffered no damage or injury by any acts or omissions of the defendant for which it is liable, nor is plaintiff entitled to the relief sought by the Second Count of its supplemental complaint in that plaintiff has failed to comply with the prerequisites therefor and has by its wilful misconduct discharged and relieved defendant of any obligations to plaintiff under the mortgage terms and conditions.

THIRD DEFENSE

13. Plaintiff pleads by the Second Count of its supplemental complaint that the lawsuit by Mayer against plaintiff and C. J. Achee, individually, was based upon plaintiff's inability "to convey lots to Mayer, free and clear of the lien of the mortgage

held by defendant".

14. The lawsuit by Mayer in the Superior Court of New Jersey, Chancery Division, Ocean County under Docket No. C226-73, by the complaint, charges this plaintiff and Achee with a "fraudulent scheme and device designed to entice plaintiff into a contract for the purchase" of approximately 450 lots contained in the mortgaged premises herein, as well as with fraudulent acts thereafter.

15. Paragraph "11" of the Mayer complaint alleges:

"As a further part of the design and plan to fraudulently induce plaintiff to enter into a contract with defendants to purchase the said lands, defendant, Day Pol, and its President, C. I. Achee, employed various fraudulent stratagems and devices calculated to deceive plaintiff as to the true state of facts regarding the purchase, by misrepresenting to plaintiff, inter alia, the following:

(a) That defendants had sufficient financial capability and know-how to adequately and timely perform the subdivision and improvement work, when in fact, defendants were in severe financial difficulties and lacked sufficient resources to adequately and fully undertake the completion of the project.

(b) That the initial payment by plaintiff for \$450,000.00 at the signing of the contract would be used by defendants to obtain releases of liens on the property, and to assist in preparing the subdivision improvements, when

in fact the money to be paid would not be sufficient to obtain the release of mortgage liens and accomplish the work, and defendants intended to use the initial payment for purposes other than those represented to plaintiff.

(c) That the defendant had already received sewer and water approval from the Berkeley Township Sewerage Authority, when in fact defendants had been advised by the Berkeley Township Sewerage Authority that its plans would not be approved as submitted.

(d) That with the \$150,000.00 to be paid on execution of the contract, plus the monies to be paid at the closing of title to each section of land to be conveyed, defendants would have sufficient monies to satisfy all indebtedness on the property and obtain releases of all mortgage liens, when in fact defendants had concealed and misstated the true nature of their mortgage indebtedness on the property, so as to fraudulently conceal from plaintiff the fact that the price paid per lot would not be sufficient to effect the improvements and satisfy the indebtedness."

16. Paragraph "17" of the Mayer complaint

alleges:

"As a part of defendants continuing fraudulent plan and scheme representations were made by defendants that certain releases of mortgage liens had been obtained from the first mortgagor of the property, when in fact such release had not been obtained."

17. Paragraph "18" of the Mayer complaint

alleges:

"Defendants continuing pattern

of misrepresentation and fraud is further evidenced by its acknowledgement that the time for conveyance of the lots was of the essence to the transaction, while at the same time defendants knew that the time set for conveyance could not be met by defendants in view of their failure to perform the subdivision improvements, obtain municipal and utility approvals and releases of mortgage liens."

18. By reason of the foregoing, defendant has no liability for the lawsuit between Mayer and plaintiff, or any liability thereunder as to the releases claimed by plaintiff to have been wrongfully withheld by defendant from plaintiff.

FOURTH DEFENSE

19. Plaintiff made a loan application, in or about July, 1972, to the Chase Manhattan Mortgage and Realty Trust ("Chase") for Five Million (\$5,000,000) Dollars, to be secured by a first mortgage on the aforementioned mortgaged premises.

20. Chase issued a sixty (60) day commitment letter to plaintiff for said loan on October 16, 1972, accepted by plaintiff on November 3, 1972. Said commitment provided in part, that of the loan proceeds the sum of Three Million eight hundred thousand (\$3,800,000) Dollars would be applied by plaintiff for refinancing prior existing mortgage liens and encumbrances so as to effect a first mortgage lien to Chase securing its loan of Five Million (\$5,000,000) Dollars. The balance of the loan proceeds in the sum of One Million two hundred thousand (\$1,200,000) Dollars was to be applied for "land development purposes".

21. Prior to obtaining aforesaid commitment from Chase, plaintiff did not disclose but concealed from Chase that in

addition to the then existing first mortgage held by FMI to secure advances of Three Million three hundred thousand (\$3,300,000) Dollars, the defendant held a mortgage of record of Four Million fifty thousand (\$4,050,000) Dollars, subordinate to the FMI mortgage. As a consequence, plaintiff would be unable to provide Chase with a first mortgage lien of Five Million (\$5,000,000) Dollars, except by assignment of the FMI mortgage and consent to subordination by the defendant to such mortgage lien.

22. Plaintiff did not disclose to defendant either the negotiations with or issuance by Chase of the aforesaid commitment letter, but engaged upon a course of economic and legal threats to force defendant to accept a fraction of the principal due under its mortgage for satisfaction thereof. Defendant had no knowledge of the Chase transaction until in or about April 30, 1973 by service of plaintiff's complaint herein, which alleged in paragraph "6" thereof:

"In addition to the foregoing, plaintiff has obtained from Chase Manhattan Bank a firm written mortgage commitment for \$5,000,000. Chase Manhattan is willing to accept as security for its loan a first mortgage upon the balance of the lots of which defendant is obligated to deliver releases upon payment of \$2,200 per lot to the present first mortgagee."

23. Chase terminated its obligations under the commitment letter of October 19, 1972 by exercising its right thereunder to terminate since the initial closing of the loan was not held within sixty (60) days from October 19, 1972, as therein provided. Defendant has been advised and believes that among the other causes for such termination was plaintiff's devious course of

conduct, including misrepresentations of an "understanding" with defendant, culminating in plaintiff's inability, although otherwise represented to Chase, to deliver a first mortgage lien to secure the proposed loan of Five Million (\$5,000,000) Dollars, independent of whether or not defendant delivered the releases as plaintiff alleged to be the cause for such termination.

24. Defendant was under no duty or obligation to subordinate its mortgage lien except to FMI to secure a loan not to exceed Three Million three hundred thousand (\$3,300,000) Dollars and defendant had so performed.

25. By reason of the foregoing, defendant was not at fault, did not breach any obligation in connection therewith, and is not liable to plaintiff for damages, if any, for termination by Chase of its commitment letter to plaintiff; as aforesaid.

COUNTERCLAIM

26. Defendant has a claim against plaintiff, its president and principal stockholder, C. J. Achee, and the trustees of Fidelity Mortgage Investors ("FMI") arising out of the transactions that are the subject matter of the complaint and answers thereto as set forth in the foregoing defendant's affirmative defenses, and the adjudication of which does not require the presence of third parties over whom the Court herein cannot acquire jurisdiction.

27. The additional parties defendant in connection with this counterclaim are C. J. Achee, a resident of the State of New Jersey, and the trustees of Fidelity Mortgage Investors, a Massachusetts business trust, whose principal place of business is in the State of Florida.

28. Defendant, as agreed, subordinated the lien

of its prior executed and recorded mortgage to the FMI mortgage, for the limited purpose of effecting advances to plaintiff by FMI as a total of Three Million three hundred thousand (\$3,300,000) Dollars, solely for development of the property and to protect and improve the security of the mortgaged premises, with the further proviso that the principal of said mortgage would be reduced from the proceeds of sales by plaintiff of lots contained within the mortgaged premises.

29. FMI and Mayer advanced certain moneys to plaintiff and/or its president, C. J. Achee, in amounts presently unknown to defendant, to be used in part for development of the property and, in part, to purchase and discharge certain other mortgages and liens of record as of dates prior to the recordation of defendant's mortgage.

30. Such mortgages and liens were subsequently so purchased and acquired from said funds provided by FMI and Mayer for such purpose by assignments in the name of C. J. Achee, individually.

31. The plaintiff was debited for such advances from FMI and Mayer as primary obligations of plaintiff to FMI and Mayer and used by Achee and FMI to impair, diminish and defeat the defendant's interest and security in the mortgaged premises by retaining the aforesaid acquired mortgages and liens as superior to the lien of defendant's mortgage and by preserving for the benefit of C. J. Achee, individually, and/or FMI the original recorded dates of such acquired mortgages and liens so as thereby wrongfully to afford record priority of same over defendant's mortgage.

32. The plaintiff, its president, C. J. Achee, individually, and FMI breached their fiduciary duty and contractual obligations to discharge of record the aforesaid mortgages and liens

so acquired and to protect, preserve and improve the security of the mortgaged premises as to defendant.

33. The plaintiff and C. J. Achee, individually, with FMI, collusively wronged and injured the defendant and impaired, diminished and defeated the security of its mortgage by fraudulently diverting and misusing the funds provided by FMI and Mayer from the purposes, among others, which induced defendant to subordinate its mortgage to the FMI mortgage, by converting to the separate or collective interests of C. J. Achee and FMI, the rights, benefits and property of the defendant to a degree and amount in damages presently undetermined.

34. By reason of the foregoing, the plaintiff, C. J. Achee, individually, and FMI, are liable to defendant for damages presently undetermined, and for an accounting of all transactions between them as may be required and proper in the premises for such determination and assessment of damages to defendant.

35. Defendant has no adequate remedy at law for the relief sought by the within counterclaim.

WHEREFORE, the defendant demands as to the aforesaid counterclaim:

(1) That the Court order C. J. Achee and the trustees of Fidelity Mortgage Investors to be brought in as parties defendant to respond to the claim set forth above,

(2) That the plaintiff and the aforementioned C. J. Achee and the trustees of Fidelity Mortgage Investors, as parties defendant, be directed to account to the defendant for all monies and benefits derived from the transactions herein set forth and for the injuries and damages sustained therefrom by defendant,

(3) For such other and further relief as to the Court may seem just and proper, together with costs.

36. Defendant denies that plaintiff is entitled to the relief prayed for in the complaint or supplemental complaint or any part thereof, or to any relief against this defendant, and defendant prays that the complaint and supplemental complaint be dismissed with costs to defendant.

Dated: February 21, 1971

HERMAN E. COOPER
Attorney for Defendant

by J. E. Cooper
500 Fifth Avenue,
New York, N. Y., 10036
(212) 354 - 1520

Q211

Filed in Court with
the Clerk on 3/13/74

24

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
BAY POINT CORP., Plaintiff :
vs. : 73 Civ. 2549 CLB
REPUBLIC NATIONAL BANK OF : Docket No.
NEW YORK, Defendant : PLAINTIFF'S ANSWER TO
DEFENDANT'S COUNTERCLAIM
-----X

3-13-74

Plaintiff, Bay Point Corp., answering the allegations contained in Defendant's Counterclaim, says:

Plaintiff denies each and every allegation contained in paragraphs 26 through 35 of Defendant's pleading entitled "Defendant's Answer and Counterclaim to Plaintiff's Supplemental Complaint", which paragraphs constitute the entire portion of that pleading denominated by Defendant as a "Counterclaim".

FIRST SEPARATE DEFENSE

The allegations contained in Defendant's Counterclaim do not relate to Plaintiff, but rather to third parties over whom this Court does not have jurisdiction.

SECOND SEPARATE DEFENSE

To whatever extent the allegations contained in Defendant's Counterclaim may be directed against Plaintiff, it is not possible to resolve the issues raised therein in this Court, because this Court lacks jurisdiction over other essential parties named therein.

THIRD SEPARATE DEFENSE

The Counterclaim pleaded by Defendant does not relate to any material pleaded by Plaintiff in its Supplement to its Complaint, and, therefore, is out of time and is barred by the rules of this Court.

PATTERSON, BELKNAP & WEBB
Attorneys for Plaintiff

By Patterson Belknap & Webb

Demand for Jury Trial

Plaintiff demands a trial by jury as to all issues.

PATTERSON, BELKNAP & WEBB
Attorneys for Plaintiff

By Patterson Belknap & Webb

24A

A-80

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROTHMAN CORP.,

Plaintiff,

-against-

EMERSON NATIONAL BANK OF NEW YORK,

Defendant.

73 Civ. 2545-CLB

ORDER GRANTING STAY
AND TRANSFERRING ACTION
TO SUPERIOR COURT

On the consent of all counsel appearing at a conference held the 13th day of March, 1974 before me, it is

ORDERED, that all proceedings in this action be and they hereby are stayed pending a determination by the Superior Court of the State of New Jersey fixing and determining the amount due, if any, upon the indebtedness secured by the mortgage referred to in the complaint herein, or until the further order of this Court; and it is further

ORDERED, that this action is transferred to the Super-
ior Court pursuant to Rule 30-A of the General Rules
of this Court, and may be reentered to my docket on the motion of
any party made on ten (10) days notice to all counsel appearing.

or upon such shorter notice as the Court may direct, if it shall appear that the stay has expired, or should be vacated in the interests of justice.

Dated: New York, New York
March 13, 1975

Charles L. Bryant, Jr.
CHARLES L. BRYANT, JR.
U. S. D. J.

Endorsement

BAY POINT CORP., Plaintiff v. REPUBLIC NATIONAL BANK OF NEW YORK,
Defendant. 73 Civ. 2549-CLB

The within motion is disposed of as follows:

1. The action is transferred from the Suspense Docket of this Court to my docket as an active case, and the stay of proceedings made on consent by order dated March 13, 1974 is vacated.

2. Discovery shall be resumed and shall be conducted with diligence, except that in scheduling, priority shall be given to obligations of the parties and counsel to the New Jersey Superior Court in the mortgage foreclosure action under docket F-404-73 (Laird Associates, Inc. v. Bay Point Corp., et al.). If the parties cannot agree on dates for discovery, further application shall be made to me by Order to Show Cause.

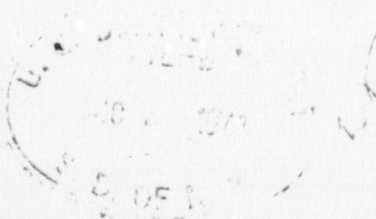
3. So much of the motion which seeks to restrain proceedings in the mortgage foreclosure action abovementioned is denied. Unless that trial, presently scheduled to begin January 25, 1975, is unduly delayed, it appears trial of this case (but not discovery) should await conclusion of those proceedings. Obviously, to the extent that Court may lack jurisdiction over a party or the subject matter of a claim, our jurisdiction will not be affected. Viewed most favorably to defendant movant, there is no factual basis for any finding of irreparable damage which would warrant any stay of the state court proceedings as requested herein.

So Ordered.

Dated: New York, New York
 December 3, 1974

Charles L. Brieant Jr.

CHARLES L. BRIEANT, JR.
 U. S. D. J.



mw
17
UNITED STATES DISTRICT
SOUTHERN DISTRICT OF NEW YORK

BAY POINT CORPORATION,

Plaintiff,

-vs.-

REPUBLIC NATIONAL BANK OF NEW YORK,

Defendant.



ORDER

73 Civ. 2549 (CLB)

-----x-----
Upon consideration of defendant's motion for an order directing a separate trial of the issues herein as to the validity of the certain mortgage referred to in the pleadings, and for a stay of proceedings as to said issues before the Superior Court of the State of New Jersey, Ocean County, in a foreclosure action by Laird Associates, Inc. vs. Bay Point Corporation, Republic National Bank of New York, et al., Docket No. F-404-73, until the further order of this Court, and to strike the demand for a jury trial heretofore served and filed by plaintiff insofar as the issue of the aforesaid mortgage is concerned, and

Said motion having come on for hearing on the 9th day of January, 1975, and the Court having heard the argument of counsel and being fully advised, it is

ORDERED that the defendant's motion be granted in part by stay of proceedings before the Superior Court of the State of New Jersey,

MICROFILM

JAN 30 1975

Ocean County, as to the issue of the validity of the certain mortgage of which the plaintiff herein is the mortgagor and the defendant herein is the holder by assignment, as necessary in aid of the jurisdiction of this Court and to protect and effectuate its judgments, and it is further

ORDERED that this action be marked preferred on the Civil Calendar of this Court; and it is further

ORDERED that the defendant's motion be otherwise denied without prejudice to renew upon entry of a pretrial order herein, and it is further

ORDERED that the within stay shall not operate to preclude the Superior Court of the State of New Jersey, Ocean County from adjudicating with finality other issues between the parties as to their respective liens on the property which is the subject of the foreclosure proceeding pending in said Court, and that the parties herein may continue discovery proceedings in accordance with the Rules and procedures of this Court and of the Superior Court of the State of New Jersey, Ocean County, as may be appropriate, and it is further

ORDERED that the plaintiff herein, directly, indirectly or through its servants, agents or attorneys, be stayed from proceeding before the Superior Court of the State of New Jersey for any relief which might result in an adjudication by said Court of the issues now before this Court in the within action.

Dated: January 29, 1975

AT NEW YORK, N.Y.

Issued at 1:00 P.M.

Charles L. Bryant Jr.
United States District Judge

A TRUE COPY

RAYMOND W. BURCHARDT, Clerk

BY

Earl Bock

Deputy Clerk

36C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BAY POINT CORP.,

Plaintiff,

vs.

REPUBLIC NATIONAL BANK OF
NEW YORK,

Defendant.

AFFIDAVIT

73 Civ. 2549 (CLB)

STATE OF NEW JERSEY:

SS

COUNTY OF CAMDEN :

WARREN G. EVOY, of full age, being duly sworn,
according to law, upon his oath deposes and says:

1. I am a partner in the firm of Evoy and Feinberg, Esquires, 498 North Kings Highway, Cherry Hill, New Jersey, 08034, attorneys for the plaintiff, Laird Associates, Inc., and make this affidavit in response to the motion of Bay Point Corp. returnable February 28, 1975 before this court and in opposition of the motion of the Republic National Bank of New York to hold myself and Alexander Feinberg, Esquire, of this office, for contempt of this Court.

2. The Bay Point Corp. is the owner of certain lands situate in the Township of Berkeley, County of Ocean, State of New Jersey which consists of approximately 2870 up land bay front

and lagoon lots.

3. Bay Point Corp. executed a Note to Laird in the sum of \$450,000.00 on July 13, 1974. Said Note was secured by a mortgage on the subject property dated July 14, 1971 and recorded July 14, 1971 in Book 1622 page 456. This mortgage is in the amount of \$450,000.00.

4. Upon default of the terms and conditions of the Note and Mortgage, Laird Associates, instituted foreclosure proceedings. Laird filed its original complaint and foreclosure on October 3, 1973 and subsequently filed an amended complaint on December 21, 1973.

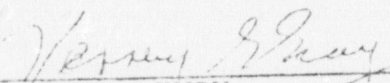
5. The Republic National Bank was made a party to the foreclosure proceedings and summons and amended complaint were served on February 14, 1974 being acknowledged by Arnold M. Smith, Esquire, attorney for Republic National Bank of New York.

6. Republic National Bank, through its attorney, Arnold M. Smith, Esquire, submitted generally to the jurisdiction of the Superior Court of New Jersey in this foreclosure action and filed its answer together with a counterclaim and crossclaim, which were served within the time provided under rule RR4:6. See attached exhibits.

7. The Laird Associates foreclosure is an in rem proceeding in the State of New Jersey against property located within its jurisdiction in the County of Ocean and said proceeding is under the jurisdiction of the courts of New Jersey.

8. It is the position of this affiant as well as that of Alexander Feinberg, and the understanding of the Superior Court of New Jersey that Laird Associates was not and is not a party to the litigation now before this honorable court in the United States District Court, Southern District of New York.

9. The affiant, together with Alexander Feinberg, relies on the Memorandum in Support of the plaintiff's motion filed by Bay Point Corp. in this matter.


WARREN G. EVOY

Sworn and Subscribed to
before me this day
of February, 1975.

MARY T. O'MALLEY
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires January 17, 1976

Attorney(s): EVOY AND FEINBERG
Office Address & Tel. No.: 400 North Kings Highway, Cherry Hill, New Jersey
(609) 667-0050
Attorney(s) for Plaintiff

A-94

LAIRD ASSOCIATES, INC., a corporation
of the State of New Jersey
Plaintiff(s)

vs.

BAY POINT CORP., a corporation of the
State of New Jersey, et als Defendant(s)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, OCEAN COUNTY

Docket No. F-404-73

CIVIL ACTION

A copy of the within Notice of Motion has been filed with the Clerk of the County of
at New Jersey

Attorney(s) for

The original of the within Notice of Motion has been filed with the Clerk of the Superior Court in Tren-
ton, New Jersey.

Attorney(s) for

Service of the within SUMMONS AND AMENDED COMPLAINT

is hereby acknowledged this 14th day of February, 1974.

Arnold Smith
Attorney(s) for Republic National Bank
of New York

I hereby certify that a copy of the within Answer was served within the time prescribed by Rule 4:6.

Attorney(s) for

PROOF OF MAILING: On 19, I, the undersigned, mailed to

Attorney(s) for
at
by

mail, the following:

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing state-
ments made by me are wilfully false, I am subject to punishment.

Dated:

19

ARNOLD M. SMITH

ATTORNEY AT LAW

5 COLT STREET

PATERSON, N.J. 07505

A-95

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

March 5, 1974

Evoy and Feinberg, Esqs.
ATT: William I. Evoy, Esq.
498 North Kings Highway
Cherry Hill, New Jersey 08034

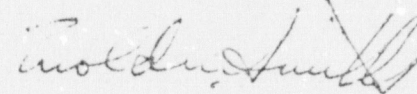
Re: Laird Associates, Inc. vs.
Bay Point Corp., et als
Superior Court of New Jersey
Chancery Division - Ocean County
Docket No. F-404-73

Dear Sirs:

Please be advised that I represent the Defendant, Republic National Bank of New York, relative to the above captioned Mortgage Foreclosure Suit, wherein you are the Attorneys for the Plaintiff.

In regard thereto, enclosed please find a copy of Answer, Counterclaim and Crossclaim of said Defendant, Republic National Bank of New York, and the same be and is hereby served upon you.

Very truly yours,


Arnold M. Smith

AMS/lm
Encl.

ARNOLD M. SMITH,
 Attorney for Defendant,
 Republic National Bank of New York
 5 Colt Street
 Paterson, New Jersey 07505
 201-742-7750

SUPERIOR COURT OF NEW JERSEY
 CHANCERY DIVISION-OCEAN COUNTY
 DOCKET NO. C-404-73

LAIRD ASSOCIATES, INC., a
 corporation of the State of
 New Jersey,

Plaintiff,

-vs-

RAY POINT CORP., a corporation of
 the State of New Jersey; C. J.
 ACONE; FIDELITY MORTGAGE INVESTORS,
 a Massachusetts Business Trust;
 REPUBLIC NATIONAL BANK OF NEW
 YORK, a Banking corporation of the
 United States of America; LOUIS WERB;
 ALFRED A. PORRO, JR.; ERMAUT W.
 GRIFFITH; HENEST, HENEST & HENEST,
 a New Jersey corporation; CHARLES E.
 VILLANUEVA, Trustee; BOARD OF
 EDUCATION OF THE TOWNSHIP OF
 BERNSELEY, a Quasi-Municipal
 corporation of the State of New
 Jersey; THE RAYER CORPORATION, a
 corporation of the State of New
 Jersey,

Defendants.

CIVIL ACTION

ANSWER OF DEFENDANT,
 REPUBLIC NATIONAL BANK OF
 NEW YORK
 and COUNTERCLAIM and
 CROSSCLAIM

Defendant, Republic National Bank of New York, answers the Amended Complaint of the Plaintiff as follows:

FIRST COUNT

1. Relative to the allegations set forth in Paragraphs 1, 2, 3, 4, 5, 6 and 7 of the First Count of the Amended Complaint, this Defendant states that it does not have sufficient knowledge and information about the same upon which to base any reasonable belief and, therefore, this Defendant neither admits nor denies such allegations and it leaves the Plaintiff to its proofs pertaining thereto.

2. This Defendant denies that it is still in possession of the mortgaged premises.

3. This Defendant denies that any interest or lien which it has or claims to have in and to the said mortgaged premises or some part thereof is subject to the lien of the mortgage of said Plaintiff.

SECOND COUNT

1. This Defendant repeats its foregoing answers under the above First Count of this Answer pertaining to the allegations set forth in Paragraphs 1 through and including 9 of the First Count of the Amended Complaint and makes the same a part hereof as if repeated at length.

2. This Defendant denies that it at any time deprived the Plaintiff of possession of the said premises.

THIRD COUNT

1. This Defendant repeats its foregoing answers under the above First Count and Second Count of this Answer pertaining to the allegations set forth in Paragraphs 1 through and including 9 of the First Count and Paragraphs 1 and 2 of the Second Count of the Amended Complaint and makes the same a part hereof as if repeated at length.

2. Relative to the allegations set forth in Paragraphs 2 through and including 16 of of the Third Count of the Amended Complaint, this Defendant states that it does not have sufficient knowledge and information about the same upon which to base any reasonable belief and, therefore, this Defendant neither admits nor denies such allegations and it leaves the Plaintiff to its proofs pertaining thereto.

FOURTH COUNT

1. This Defendant repeats its foregoing answers under the above First Count, Second Count and Third Count of this Answer pertaining to the allegations set forth in Paragraphs 1 through and including 9 of the First Count, Paragraphs 1 and 2 of the Second Count and Paragraphs 1 through and including 16 of the Third Count of the Amended Complaint and makes the same a part hereof as if repeated at length.

2. This Defendant admits the allegations of Paragraph 2.

3. This Defendant admits the allegations of Paragraph 3 only to the extent that certain rights in and to said Mortgage were thereby assigned by United Berkeley to this Defendant.

This Defendant admits the allegations of Paragraph 4.

5. Relative to the allegations set forth in Paragraphs 5 and 6, this Defendant states that it does not have sufficient knowledge and information about the same upon which to base any reasonable belief and, therefore, this Defendant neither admits nor denies such allegations and it leaves the Plaintiff to its proofs pertaining thereto.

6. Concerning the allegations mentioned in Paragraph 7, this Defendant admits the same, except that it denies that said mortgage was fraudulent in that there was no consideration given for the mortgage.

7. Pertaining to the allegations enumerated in Paragraph 8, this Defendant admits that said mortgage was given to secure the purchase price paid in the conveyance of the property, but it denies all of the remainder of said allegations in said Paragraph 8 stated.

8. This Defendant states that it does not have sufficient knowledge and information about the allegations of Paragraph 9 upon which to base any reasonable belief and, therefore, it

neither admits nor denies such allegations and it leaves the Plaintiff to its proofs about the same.

9. Relative to the allegations set forth in Paragraph 10, this Defendant neither admits nor denies the same and indicates that said letter referred to therein, a copy of which is attached to said Amended Complaint, speaks for itself and otherwise leaves Plaintiff to its proofs relative to the same.

10. This Defendant admits all of the allegations of Paragraph 11.

11. Concerning the allegations set forth in Paragraphs 12, 13, 14, 15, 16 and 17 of the Fourth Count of the Amended Complaint, this Defendant states that it does not have sufficient knowledge and information about the same upon which to base any reasonable belief and, therefore, this Defendant neither admits nor denies the allegations and it leaves the Plaintiff to its proof.

12. This Defendant joins in the demands of the Plaintiff for Judgment and also demands that such Judgment shall fix the amount due on the Note and Mortgage of this Defendant, and that it be paid the amount so fixed with interest and costs and that the lands described in said Amended Complaint be sold to satisfy such amount as well as the amount due to the Plaintiff.

FIRST SEPARATE DEFENSE

1. On or about July 7, 1971, United Berkeley Realty Enterprises Corp. (herein referred to as United Berkeley) duly executed and delivered its Deed unto Bay Point Corp. (herein referred to as Bay Point) so as to convey all of its right, title and interest in and to said premises in question to the said Bay Point. In consideration therefor, Bay Point on or about the same date duly executed and delivered unto United Berkeley its Purchase Money Mortgage. For and in consideration of the release by this Defendant of a certain Lis Pendens heretofore filed by said Defendant involving said Bay Point and United Berkeley relative to said premises in question and for other good and valuable consideration, the said United Berkeley assigned certain rights under said Purchase Money Mortgage unto this Defendant, by and with the consent and knowledge of Bay Point and said Plaintiff. Said Purchase Money Mortgage and said Assignment were duly recorded July 8, 1971 respectively.

2. By virtue thereof, said Mortgage from Bay Point to United Berkeley was made for a good and valuable consideration.

SECOND SEPARATE DEFENSE

1. This Defendant repeats the allegations set forth in Paragraph 1 of the First Separate Defense.

2. By virtue thereof, Plaintiff is estopped to assert

that said Purchase Money Mortgage was fraudulent and made without any consideration being given therefor.

THIRD SEPARATE DEFENSE

1. This Defendant repeats the allegations set forth in Paragraphs 1 and 2 of the Second Separate Defense.

2. By virtue thereof, Plaintiff is deemed to have waived, relinquished and released its right to challenge that such Purchase Money Mortgage was so fraudulent and made without any consideration.

FOURTH SEPARATE DEFENSE

The Purchase Money Mortgage now held by this Defendant constitutes a lien against said premises in question prior to and having a precedence superior to the lien of said Plaintiff based upon its Mortgage.

COUNTERCLAIM

Defendant, Republic National Bank of New York, by way of Counterclaim, complains of the Plaintiff, Laird Associates, Inc., as follows:

1. On or about July 7, 1971, United Berkeley duly executed and delivered unto Bay Point its deed so as to convey to Bay Point all of those lands and premises therein more particularly described within the Township of Berkeley, County of Ocean

and State of New Jersey, which said premises are more fully described in Paragraph 1 of the First Count of the Amended Complaint filed by the Plaintiff in this cause and said deed was duly recorded on July 6, 1971 in the Office of the Ocean County Clerk.

2. Bay Point executed to United Berkeley a mortgage dated July 7, 1971 and recorded July 8, 1971 in Book 1621 of Mortgages, page 97, re-recorded January 12, 1973 in Book 1738 of Mortgages, page 1. Said mortgage was given to secure the sum of \$4,050,000.00.

3. Said Mortgage executed by Bay Point to United Berkeley was a Purchase Money Mortgage given to secure the full purchase price of \$4,050,000.00.

4. United Berkeley executed to Republic National Bank an assignment of certain rights in and to said mortgage, which said Assignment was dated July 7, 1971 and recorded with the Ocean County Clerk on July 8, 1971 in Book 154 of Assignment of Mortgages, page 703.

5. On July 13, 1971, the Defendant Bay Point, a corporation of the State of New Jersey, being indebted to Laird Associates, Inc. in the sum of \$450,000.00 executed to the Plaintiff a mortgage note of that date in the full amount of \$450,000.00.

6. To secure payment of the mortgage note dated July 13, 1971, the said Bay Point executed to the Plaintiff a mortgage

dated July 14, 1971 and did thereby convey to it, in fee, the land more particularly described in Paragraph 3 of the First Count of the Amended Complaint, on the express condition that such conveyance would be voided if payment should be made according to the terms of the mortgage note. Said mortgage was duly recorded in the Ocean County Clerk's Office on July 14, 1971, in Book 1622, page 456.

7. The recording and dating of the Laird Associates mortgage was made subsequent to the recording and dating of the mortgage of Bay Point to United Berkeley and the assignment of said mortgage to Republic National Bank by Bay Point.

8. By reason of the foregoing, this Defendant claims that its mortgage constitutes a lien prior to and having precedence superior to the lien of said Mortgage of the Plaintiff.

WHEREFORE, this Defendant demands Judgment that the Mortgage held by it is prior and superior in lien against said premises to the lien of the Mortgage of Plaintiff, costs, ^{and} such other relief as the Court deems equitable in the cause.

CROSSCLAIM

Defendant, Republic National Bank of New York, by way of Crossclaim against Defendants Bay Point Corp. and C. J. Achae and Fidelity Mortgage Investors, says as follows:

FIRST COUNT

1. Defendant repeats the allegations of Paragraphs 1, 2,

3 and 4 of the Counterclaim.

2. Both the Note and the Mortgage made on July 7, 1971 by Bay Point to United Berkeley, in which said Note and Mortgage certain rights were assigned to this Defendant, provide that 6% per annum interest is to be payable quarterly, beginning with October 1, 1973 and that upon 30 days default in any payment due thereunder the entire unpaid balance of the principal and interest thereon shall immediately become due and payable, at the election of the holder.

3. Said Defendant Bay Point owed \$60,070.00 interest thereunder on October 1, 1973 to this Defendant as the holder of said Note and Mortgage.

4. Said Defendant Bay Point failed to pay said interest in whole or in part on October 1, 1973 and said Defendant Bay Point failed to pay the same or any part thereof within 30 days after October 1, 1973 and said Defendant Bay Point still fails to pay the same to the date hereof, notwithstanding proper demand of this Defendant to Defendant Bay Point for the same.

5. This Defendant, by proper written notice to Defendant Bay Point, has exercised its rights and it has elected that the entire unpaid principal of \$4,050,000.00, plus said interest thereon should be immediately due and payable.

6. Defendant Bay Point has failed to pay said principal

and interest on said Note and Mortgage held by this Defendant.

7. Furthermore, said Mortgage held by this Defendant also provides that Defendant Bay Point is to pay taxes covering the mortgaged premises or part thereof and if said taxes remain unpaid and in arrears for 60 days, then the principal sum, plus all arrearage of interest, shall at the option of the Mortgagee become and be due and payable immediately.

8. Defendant Bay Point failed to pay the said taxes relative to said mortgaged premises for the entire year of 1972 and part or all of the year of 1973 and said delinquency has persisted for more than 60 days from and after said taxes becoming due.

9. This Defendant has and does now elect that under said Note and Mortgage the entire unpaid principal balance of \$4,050,000.00, plus interest thereon, be immediately due and payable.

10. Defendant Bay Point has failed to pay such principal balance and interest due under said Mortgage and Note.

11. Defendant Bay Point is still in possession of the mortgaged premises.

12. Any interest or lien which Plaintiff and the other Defendants have or claim to have in or upon said mortgaged premises or any part thereof, is subject to the prior lien of

the Mortgage of this Defendant.

WHEREFORE, this Defendant demands Judgment as follows:

(a) Fixing the amount due on its mortgage to be \$4,050,000.00, plus interest computed at 6% per annum from the applicable date.

(b) Barring and foreclosing the Defendant Bay Point of all equity and redemption in and to said lands and premises.

(c) Directing that this Defendant be paid the amount due on the mortgage with interest, advances, attorneys fees and costs.

(d) Adjudging that said lands be sold according to law to satisfy the amount due this Defendant.

SECOND COUNT

1. This Defendant repeats the allegations set forth in Paragraphs 1, 2, 3 and 4 of the Counterclaim.

2. Under date of July 23, 1971, this Defendant executed to the Trustees of Fidelity Mortgage Investors (herein called FMI) a Postponement of Mortgage, which was recorded in the Office of the Ocean County Clerk on August 2, 1971 in Release of Mortgage Book 181, page 602. Said Postponement subordinated the lien of the aforesaid mortgage held by this Defendant solely to the mortgage of FMI in a sum not to exceed \$3,300,000.00.

3. The purpose of the Postponement of said Mortgage

by this Defendant was to allow FMI to advance that portion of its mortgage to Bay Point in order to develop the property and to protect the security of the mortgaged premises.

4. Subsequent to the execution of the Postponement of Mortgage by this Defendant, FMI advanced certain monies to Bay Point and to C. J. Achae.

5. Bay Point and C. J. Achae used said advances for the development of the property and to purchase certain other mortgages on the property of prior status than the Mortgage of this Defendant.

6. Subsequently, the following mortgages were purchased and acquired by C. J. Achae through assignment:

(a) MORTGAGE: Berkeley Shore Estates to Inland Credit

Corporation dated January 18, 1968, recorded February 7, 1968, in Book 1374 of Mortgages, Page 178, to secure the sum of \$250,000.

ASSIGNMENT: Inland Credit Corporation to C. J. Achee by Assignment dated January 22, 1972, recorded January 24, 1973, in Book 166 of Assignments, page 95.

Any interest or lien which the defendants have or claim to have in or upon the said mortgage premises or some part thereof is subject to the lien of ~~defendant's~~ mortgage.

(b) MORTGAGE: Berkeley Shore Estates, Transcoastal Industries Corp., South Jersey Land Corp. to Bond and Mortgage Company of New Jersey, dated February 23, 1968, recorded March 13, 1968, in Book 1380 of Mortgages, Page 141, to secure the sum of \$74,853.25.

POSTPONEMENT OF MORTGAGE: Bond and Mortgage Company of New Jersey and Bay Point Corp. dated July 30, 1971, recorded August 2, 1971 in Book 181 of Releases, Page 598, subordinated lien of above mortgage to mortgage made by Bay Point Corp. to Fidelity Mortgage Investors in the sum of \$3,300,000.00.

ASSIGNMENT: Bond and Mortgage Company of New Jersey to C. J. Achee dated January 22, 1973, recorded January 24, 1973, in Book 166 of Assignments, Page 87. Assigns mortgage book 1380, Page 141.

Any interest or lien which the defendants have or claim to have in or upon the said mortgage premises or some part thereof is

subject to the lien of defendant's mortgage.

(c) MORTGAGE: Berkeley Shore Estates, Transcostal Industries Corp., South Jersey Land Corporation to Bond and Mortgage Company of New Jersey dated March 15, 1968, recorded March 22, 1968 in Book 1381 of Mortgages, Page 444 to secure the sum of \$25,000.

POSTPONEMENT OF MORTGAGE: As recited above. Subordinates lien of Mortgage Book 1381, page 44 to lien of mortgages made by Bay Point Corp. to Fidelity Mortgage Investors in the sum of \$3,300,000.

ASSIGNMENT: Bond and Mortgage Company of New Jersey to C. J. Achee dated January 22, 1973, recorded January 24, 1973 in Book 166 of Assignments, Page 89. Assigns Mortgage Book 1381, page 444.

Any interest or lien which the defendants have or claim to have in or upon the said mortgage premises or some part thereof, is subject to the lien of defendant's mortgage.

(d) MORTGAGE: South Jersey Land Corp. to Berkeley Shore Estates dated December 14, 1960, recorded March 18, 1961, in Book 919, of Mortgages, Page 460 to secure \$1,090,000.

POSTPONEMENT OF MORTGAGE: Berkeley Shore Estates and Bankers Bond and Mortgage Company of New Jersey dated November 21, 1962, recorded November 21, 1962, in Book 100 of

Releases, Page 331. Subordinates Mortgage book 919, Page 460 to Mortgage made by South Jersey Land Corp. to Bankers Bond and Mortgage Company of New Jersey in the sum of \$1,290,000. Mesne assignments to Inland Credit Corporation.

ASSIGNMENT: Inland Credit Corporation to C. J. Achee by assignment dated January 19, 1973, recorded January 24, 1973, in Book of Assignments, 166, page 93. The Plaintiff has been advised that C. J. Achee has assigned said mortgage herein before described to FMI which assignment is not of record.

Any interest or lien which the defendants have or claim to have in or upon the said mortgage premises or some part thereof, is subject to the lien of defendant's mortgage.

(e) MORTGAGE: Bay Front Construction Co., Inc. to Bond and Mortgage Company of New Jersey, dated March 5, 1963, recorded March 6, 1963, in Book 1034 of mortgages, page 130. To secure the sum of \$1,210,000.

ASSIGNMENT: Bond and Mortgage Company of New Jersey to C. J. Achee, dated January 22, 1972, recorded January 24, 1973, in Book 166 of Assignments, Page 91.

Any interest or lien which the defendants have or claim to have in or upon the said mortgage premises or some part thereof, is subject to the lien of defendant's mortgage.

(f) MORTGAGE: Transcoastal Industries Corp. to Budjan Investment Corp., dated December 20, 1967, recorded January 17, 1968, in Book 1370 of Mortgages, Page 185 to secure the sum of \$46,400.

ASSIGNMENT: Budjan Investment Corp. to Robert Personnette by assignment dated July 30, 1972, recorded August 2, 1972, in Book 155 of Assignments, page 199.

A-112

ASSIGNMENT: Robert Personnette to C. J. Achee dated January 22, 1973, recorded January 24, 1973 in Book 166 of Assignments, Page 131.

Any interest or lien which the defendants have or claim to have in or upon the said mortgage premises or some part thereof, is subject to the lien of defendant's mortgage.

(g) MORTGAGE: Bay Front Construction Co. to Berkeley Shore Estates on December 31, 1961 recorded February 19, 1962 in Book 1032 of Mortgages, page 174, to secure the sum of \$616,000.00.

ASSIGNMENT: Berkeley Shore Estates to C. J. Achee and said mortgage was subsequently assigned by C. J. Achee to Fidelity Mortgage Investors by an unrecorded assignment.

Any interest² or lien which the defendants, C. J. Achee and Fidelity Mortgage Investors, have or claim to have in or upon the said mortgaged premises or some part thereof, is subject to the lien of the defendant's mortgage.

9. Said mortgages were held as additional security by FMI.

10. Subsequently, C. J. Achee executed a postponement of Mortgage to FMI dated January 23, 1973, recorded January 24, 1973 recorded in Book 193 of Mortgages, page 566, and a postponement of mortgage dated February 21, 1973, recorded April 25, 1973 in Book 195, page 645.

7. Said Mortgages were to have been fully paid and satisfied by Bay Point and/or C. J. Achae so as to bring about the cancellation of record of each of the same and to give the mortgage of this Defendant better and higher priority and precedence as a lien against the said premises.

8. The said Defendants, Bay Point and/or C. J. Achae, although they or either of them paid and satisfied said mortgages, they then failed, neglected and refused to have each such mortgage cancelled of record.

9. Such failure, neglect and refusal on the part of the said Defendants Bay Point and/or C. J. Achae constituted fraudulent acts and conduct on their respective parts to this Defendant and the priority and precedence of its lien status under the aforesaid mortgage held by it.

10. Said mortgages were held as additional security by FHI.

11. Subsequently, C. J. Achae executed a postponement of Mortgage to FHI dated January 23, 1973, recorded January 24, 1973 in Book 193 of Mortgages, page 566, and a postponement of mortgage dated February 21, 1973, recorded April 25, 1973 in Book 195, page 645.

12. Said postponements were for the purposes of causing the aforesaid assigned mortgages to become subsequent to the lien

of the FMI Mortgage of \$7,300,000.00 as stated in said postponement.

13. The execution of the aforesaid assignments and postponement of mortgage was an act by C. J. Achae, Bay Point and FMI to deprive the Defendant of its priority and security in the mortgaged premises.

14. The FMI Mortgage, as represented by the funds advanced to C. J. Achae and Bay Point for the purchase of the hereinabove recited mortgages assigned to C. J. Achae, is subsequent to the mortgage of this Defendant.

15. Bay Point executed a mortgage to the Trustees of FMI dated December 16, 1971, recorded December 17, 1971 in Book 1652 of mortgages, page 191 which secures the sum of \$310,000.00.

Any interest or lien which those defendants have or claim to have in or upon the mortgaged premises or some part thereof, is subject to the lien of the mortgage of this Defendant.

16. Bay Point executed to Trustees of FMI dated November 1, 1971, recorded November 3, 1971 in Book 1643 of Mortgages, page 107, a certain mortgage to secure the sum of \$310,000.00.

Any interest or lien which those defendants have or claim to have in or upon the said mortgaged premises or some part thereof is subject to the lien of the mortgage of this Defendant.

17. Bay Point executed to Trustees of FMI dated March 30, 1972 recorded April 5, 1972 in Book 1673 of Mortgages, page 135, a certain Mortgage to secure the sum of \$310,000.00

Any interest or line which these defendants have or claim to have in or upon the mortgaged premises or some part thereof, is subject to the lien of the mortgage of this Defendant.

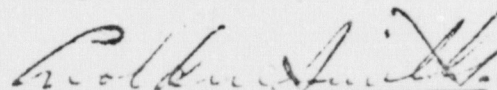
WHEREFORE, this Defendant demands Judgment:

(a) Directing a full and proper accounting of all monies received or disbursed by FMI, Bay Point and C. J. Achse regarding all the hereinbefore stated transactions.

(b) Adjudging that the lien of the mortgage of this Defendant is prior and superior to the lien of all of the mortgages mentioned in Paragraphs 6, 15, 16 and 17 of this Second Count of said Crossclaim.

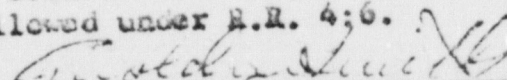
(c) Directing and ordering FMI, Bay Point and C. J. Achse to have each of the mortgages mentioned in Paragraph 6 hereof to be totally cancelled of record in the Office of the Ocean County Clerk.

(d) Costs and reasonable Attorney's fees.



Arnold M. Smith,
Attorney for Defendant,
Republic National Bank of New York

I certify that the within Answer, Counterclaim and Crossclaim were served within the time period as allowed under R.R. 4:6.


Arnold M. Smith, Attorney for Defendant,
Republic National Bank of New York

37

3/25/75

affirmed service
by RES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
BAY POINT CORP.,

Plaintiff,

-against-

REPUBLIC NATIONAL BANK
OF NEW YORK,

Defendant.
-----X

ORDER TO SHOW CAUSE

73 Civ. 2549 (CLB)

This matter has been opened to the Court by Kerby, Cooper, Schaul & Garvin, attorneys for plaintiff. Plaintiff seeks an order for a voluntary discontinuance of this action, pursuant to F.R.C.P.41(a).

It is on this 28th day of March, 1975, ORDERED as follows:

1. Defendant, Republic National Bank of New York, N.A., shall show cause before this Court on April 3, 1975, at 3:00 p.m., ^{Courtroom 506} at the United States Court House, Foley Square, New York, New York, why an order should not be entered in this action granting to plaintiff a voluntary discontinuance of this action, without prejudice, pursuant to F.R.C.P. 41(a), upon such

terms and conditions as this Court shall feel to be just and equitable.

2. Further ORDERED that a copy of this order to show cause, together with copies of all supporting papers, shall be served upon Herman E. Cooper, Esq., 500 Fifth Avenue, New York, New York, attorney for defendant, no later than 3:00 p.m., March 28, 1975.

3. Further ORDERED that defendant shall file with this Court and serve upon the attorneys for the plaintiff, no later than 3:00 p.m., April 2, 1975, any papers upon which it proposes to rely in opposition to the relief sought by plaintiff hereunder.

(s) Charles L. Brieant, Jr.
CHARLES L. BRIEANT, JR., U.S.D.J.

Dated: March 28, 1975
New York, New York

Issued at 10:35 A.M.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
BAY POINT CORP.,

Plaintiff,

-against-

REPUBLIC NATIONAL BANK
OF NEW YORK,

Defendant.
-----X

:
:
:
: AFFIDAVIT IN SUPPORT OF
: PLAINTIFF'S APPLICATION
: FOR A VOLUNTARY DISCONTINUANCE
:
: 73 Civ. 2549 (CLB)

Robert F. Schaul, being duly sworn, says:

1. I am a member of the firm of Kerby, Cooper, Schaul & Garvin, attorneys for plaintiff in this matter, and I am the attorney primarily charged with responsibility for the handling of this litigation. I am making this affidavit in support of an application on behalf of plaintiff for a voluntary discontinuance under F.R.C.P. 41.

2. The dispute between the parties in this action arises out of a mortgage on real estate located in the State of New Jersey, given by plaintiff and now held by defendant, by assignment. The original complaint in the action was filed in

April, 1973. The complaint originally contained five counts. In the first count, plaintiff described the mortgage and set forth various provisions contained in the mortgage requiring reductions in the principal amount of the debt. In this count, plaintiff requested that the amount due on the mortgage be fixed and determined by the Court.

3. In the second count of the complaint, plaintiff described certain provisions of the mortgage under which defendant was to deliver to plaintiff releases of portions of the mortgaged premises and alleged that defendant was unjustifiably refusing to deliver those releases, with the result that plaintiff's contractual relationships with a third party were being jeopardized. In this count, plaintiff requested that defendant be compelled to deliver to it the releases contemplated by the mortgage.

4. In the third count, plaintiff requested damages against the defendant. In the fourth count, plaintiff requested a declaratory judgment that certain after-acquired property was not subject to the lien of the mortgage. Finally, in the fifth count, plaintiff requested a declaratory judgment that it be excused from making interest payments called for under the mortgage until the amount of the debt thereunder could be determined.

5. Over the space of a few months after the filing of the complaint, events occurred fundamentally changing the state of facts which had existed at the time the complaint was

filed. Plaintiff's request, in the second count, that defendant be compelled to deliver releases to it became moot because, on the one hand, a mortgage commitment which plaintiff had from Chase Manhattan Realty and Investment Trust was cancelled, and, on the other hand, plaintiff's contract purchaser of lots within the mortgaged premises filed suit against plaintiff for breach of contract.

6. The relief requested in the fifth count of the complaint became moot because plaintiff elected, on the date the interest payment allegedly was due, to refuse payment on the ground that no interest, in fact, was due and owing.

7. By this time, the only elements left to be litigated under plaintiff's complaint were its request that the amounts due under the mortgage be determined, that the status of the after-acquired property be determined, and for damages.

8. Shortly thereafter, another fundamental change occurred. Another one of plaintiff's mortgagees, Laird Associates, filed an action for foreclosure in the Superior Court of New Jersey, naming both plaintiff and defendant in this action as parties defendant in that foreclosure action. In late 1974, still another mortgagee of plaintiff (which plaintiff believes to be the first mortgagee on the premises) filed an action for foreclosure in the Superior Court of New Jersey. Under New Jersey practice, as a necessary element of the disposition of the two

pending foreclosure actions against the premises, the amount due, if any, on the mortgage held by defendant Republic would have to be determined, as also would any questions as to the extent of the lien of Republic's mortgage on after-acquired property.

9. The two pending New Jersey foreclosure actions are both comprehensive in nature and involve, as parties to the action, everyone who has any interest whatsoever in the subject property. That Court has the power to grant complete relief to every litigant as to questions properly within its in rem jurisdiction.

10. Therefore, the only question presently before this Court which could not be resolved in the context of the litigation which others have begun against plaintiff in New Jersey would be plaintiff's allegations that defendant Republic breached the contract with plaintiff which it holds by assignment and is, therefore, liable to plaintiff in damages. This, however, poses a fundamental problem for plaintiff. If defendant Republic were to be found to have breached its contract with plaintiff and to be liable to plaintiff for damages, plaintiff would be unable to prove the nature and extent of the damages which it had suffered until the three pending lawsuits in New Jersey had been finally resolved (those three suits are: Laird Associates vs. Bay Point Corp., et al; Fidelity Mortgage Investors vs. Bay Point Corp., et al; and Mayer Corp. vs. Bay Point Corp.).

11. On several occasions recently the question has been discussed, during various pretrial conferences, whether plaintiff

should not take a voluntary discontinuance of this action. After considering the matter at length, plaintiff believes that the changes which have occurred since the filing of the complaint have made this step the only reasonable course to pursue. As far as issues concerning the mortgage itself are concerned, litigation is already pending in New Jersey, to which all parties having any interest in the property have been joined, and in the context of which all parties can be afforded complete relief on issues concerning the mortgage. As to issues concerning damages, plaintiff will be unable adequately to measure its damages until the New Jersey litigation has been completed.

12. It is respectfully submitted that this situation is not one of plaintiff's making. At the time the action was commenced, plaintiff believed all of its problems could be resolved within the context of this action. Changing circumstances beyond plaintiff's control have made this no longer true. Counsel for defendant has said, during conferences before the magistrate overseeing the pretrial phases of this action, that to permit us to discontinue would be "forum shopping" on our part. This is not true. Bay Point Corp. is not the plaintiff in any other actions which are pending; in every case it is the defendant.

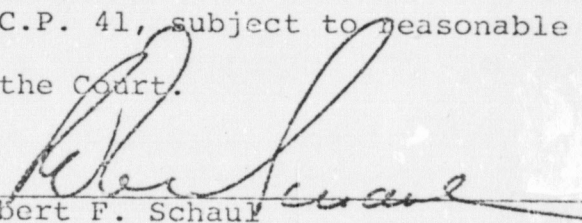
13. Plaintiff submits that this case is a proper one for the exercise of the Court's discretion to allow a voluntary dismissal at this stage of the proceedings. Defendant would not be prejudiced in any manner by dismissal. Defendant is a party



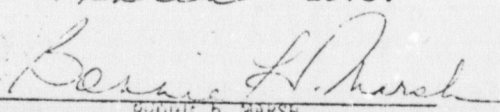
to the foreclosure action presently pending in New Jersey and has filed a claim in that action against Bay Point Corp. seeking foreclosure of its mortgage. Defendant can obtain in that action any and all relief which it might be entitled to receive.

14. Plaintiff's request for a discontinuance is made on the basis that any such dismissal should be without prejudice. It is a necessary element of plaintiff's request that plaintiff be permitted to litigate issues regarding the mortgage in the context of the New Jersey foreclosure actions. As to the damage questions, it is plaintiff's position that this aspect of the case is not ready for trial and could never be ready for trial until the two foreclosure actions and the Mayer vs. Bay Point action, all pending in New Jersey, have been completed. Indeed, it is conceivable that the decisions to be rendered in those cases might totally destroy the basis for any claim by Bay Point against Republic for damages. It is not a valid objection to a voluntary dismissal, without prejudice, that the defendant might possibly be subject to a second lawsuit. See, for example, Durham vs. Florida East Coast Railway Co., 385 F.2d 366 (1967).

15. For all of the above reasons, it is respectfully requested that plaintiff be allowed to take a voluntary discontinuance of this action under F.R.C.P. 41, subject to reasonable terms and conditions to be set by the Court.


Robert F. Schaul

Sworn and subscribed to
before me this 27th day
of March 1975.


Bernard L. Marsh
A Notary Public of New Jersey
My Commission Expires Mar. 4, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BAY POINT CORP.

Plaintiff,

against

REPUBLIC NATIONAL BANK
OF NEW YORK,

Defendant.

NOTICE OF MOTION
and
AFFIDAVIT

HERMAN E. COOPER

Attorney for Defendant

Office and Post Office Address, Telephone

500 Fifth Avenue

Borough of Manhattan New York, N. Y. 10036

354-7520

To

Attorney(s) for

Service of a copy of the within

is hereby certified.

Dated

Attorney(s) for

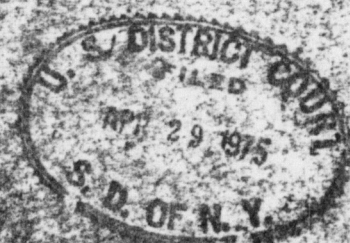
APR 28 1975

*Motion denied. The
Within Action is dismissed
with prejudice and without
cost for failure to
give discovery and failure
to prosecute. The
Complaint is dismissed
without prejudice.
See Transcript of
Hearing this date*

SO ORDERED

Charles E. Bryant Jr.
U. S. D. J.

MICROFILM
APR 29 1975



BAY POINT CORP.,

Plaintiff,

-against-

REPUBLIC NATIONAL BANK OF NEW YORK

Defendant

APR 28 1975

Motion Denied

SO ORDERED

Charles L. Bricant Jr.
U.S.D.J.

ORDER TO SHOW CAUSE
AND AFFIDAVIT

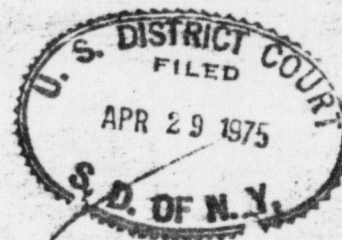
PATTERSON, BELKNAP & WEBB

Attorneys for Plaintiff

OFFICE AND POST OFFICE ADDRESS
30 ROCKEFELLER PLAZA

BOROUGH OF MANHATTAN
NEW YORK, N. Y. 10020

(212) 541-4000



MICROFILM
APR 29 1975

rgsr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

31A

BAYPOINT CORPORATION,

Plaintiff,

- v s -

REPUBLIC NATIONAL BANK,

Defendant.

73 Civ. 2549

B e f o r e :

HON. CHARLES L. BRIEANT, JR.,

District Judge.

New York, N. Y.
January 9, 1975 - 10:00 a.m.

A p p e a r a n c e s :

MOSER, GRIFFIN, KERBY & COOPER, ESQS.,
Attorneys for plaintiff,
by: ROBERT SCHAUL, ESQ., of Counsel.

HERMAN E. COOPER, ESQ.,
Attorney for Defendant.

rgsr

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3 THE COURT: The record will show that I had the
4 motion by notice, which seems to be undated, but it was
5 filed in this court January 2, 1975 by the defendant
6 Republic National Bank. I was hearing the argument informal-
7 ly on this motion here without the benefit of any transcript
8 because I felt that I could conserve the resources of this
9 Court and I ordinarily do hear motions and pre-trial con-
10 ferences without a record. However, a statement was made
11 by counsel for the plaintiff in the course of the argument
12 and if that statement is a matter of record in the case
13 I think it might warrant injunctive relief here, so I want
14 to make certain of having a complete record and also to be
15 certain that I understand the position of the plaintiff
16 in regard to this requested stay of the proceedings.

17 You may now proceed on the record, Mr. Schaul,
18 and you may begin at the beginning, if you wish.

19 MR. SCHAUL: Your Honor, the action in New Jersey
20 involves the defendant Republic National Bank as a co-
21 defendant and senior mortgagor to the party moving to fore-
22 close his mortgage. The mortgage held by the Republic
23 National Bank is for a face amount of \$4,050,000. It ap-
24 pears directly on the face of the mortgage that in fact
25 that amount is not the amount which actually will ever be
due on the mortgage. The mortgage contains very extensive

1 rgsr

2 provisions for adjustments to determine the amount which
3 will be --

4 THE COURT: Just tell me about the res judicata
5 effect. That's what we were discussing.

6 MR. SCHAUL: I am reaching that, your Honor.

7 The New Jersey Court cannot proceed to determine
8 the amount due under the mortgage, which is a necessary
9 element of any mortgage foreclosure suit, without also
10 determining the amount that is actually due on the debt.

11 Now, it is my understanding that if the New Jersey
12 Court proceeds to determine that there are "X" dollars due
13 on the mortgage debt or that there are no dollars due on
14 the mortgage debt, which is what we contend in that action,
15 then it is my belief that that Court's decision would be
16 res judicata, or at least collateral estoppel so far as
17 that issue is concerned in this action.

18 THE COURT: And that is the crucial issue in this
19 action, isn't it?

20 MR. SCHAUL: No, it isn't.

21 THE COURT: Whether they were in default and how
22 much they owed?

23 MR. SCHAUL: The crucial issue in this action is
24 whether Republic National Bank breached its mortgage contract
25 with us --they hold it through assignment, but their mortgage

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2 contract with us by refusing to perform certain acts called
3 for in the contract with resulting damages to Baypoint,
4 damages which led directly to the instituting of the
5 mortgage foreclosing proceeding in New Jersey and basically
6 our claim in this action is for damages.

7 Now, that is the reason why Judge Lacey felt that
8 this was a transitory action, not one which should be heard
9 in New Jersey as an exception.

10 THE COURT: Nobody disputes the fact that this
11 is a transitory action I am sure. The question, as I
12 understand it, and I do want to make sure I understand
13 correctly, Laird Associates, who is not a party to this
14 litigation, holds a junior lien on this property in New
15 Jersey; isn't that so?

16 MR. SCHAUL: There is an allegation that they
17 have a pari passu letter from Republic, but in terms of
18 recording sequence they are junior to Republic's mortgage.

19 THE COURT: They are seeking to foreclose and
20 sell and I also assume to get an insufficiency judgment,
21 I assume?

22 MR. SCHAUL: That is correct.

23 THE COURT: They are suing your client Baypoint
24 Corporation, which is your client, and they are suing
25 Republic National Bank, which is a necessary party to any

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2 foreclosure proceeding. It is certainly a party to any
3 surplus money proceedings after the sale.

4 MR. SCHAUL: That is right.

5 THE COURT: I take it the complaint in there
6 calls for the property to be sold free and clear of both
7 liens, Laird's lien and Republic's; am I correct?

8 MR. SCHAUL: Yes.

9 THE COURT: I am giving you these facts from my
10 memory of prior pre-trial conferences we have had, but
11 that's my understanding.

12 Now, the validity of the lien and the amount of
13 the lien of Republic are in issue in that case, isn't that
14 so?

15 MR. SCHAUL: That is correct.

16 THE COURT: There is also in issue in that case
17 whether Republic's conduct or misconduct excused payment
18 and performance by Baypoint, is that correct?

19 MR. SCHAUL: Excused, your Honor?

20 THE COURT: Yes. It constitutes a defense to
21 payment, a defense to the duty to make payment. I am basing
22 that statement on your affidavit, I think.

23 MR. SCHAUL: I don't believe that is an issue in
24 the suit, whether there was anything which they did which
25 led to an excuse of performance. Basically the position

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2 I believe that the New Jersey pleadings raise is as to the
3 validity of the document, the basic validity of the document
4 as between Republic and its assignor, which is also a party
5 to the New Jersey action, by the way.

6 THE COURT: The cross claim of Republic seems to
7 impose or collect the lien out of the property, doesn't it?

8 MR. SCHAUL: That's correct.

9 THE COURT: As I understand it, and I am referring
10 to a quotation in Mr. Cooper's affidavit, or affirmation
11 he has got it called, dated January 8th, in which he purports
12 to quote from a pre-trial statement of facts and legal
13 contentions submitted to the New Jersey Court in the Laird
14 foreclosure action by yourself on behalf of Baypoint.

15 The portions he quotes -- I won't quote them
16 verbatim because they are part of my record here -- are that
17 Republic is guilty of unclean hands in its conduct in the
18 entire transaction -- that being the mortgage transaction,
19 its assignments -- and by its own conduct is now estopped
20 from asserting the claims arising in the cross claim.

21 Among other things, defendant Baypoint desires
22 a cancellation of the mortgage by virtue of the authority
23 of certain New Jersey statutes which you cited there.

24 MR. SCHAUL: That statute, as I understand it,
25 relates to the cancellation of mortgages when there is nothing

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2 due on them.

3 THE COURT: I see.

4 MR. SCHAUL: Your Honor, I think -- now, I
5 represent to your Honor that I am not counsel for Baypoint
6 in this action which is taking place in a fairly far portion
7 of the State of New Jersey.

8 THE COURT: We can't have this confusion of
9 identity.

10 MR. SCHAUL: I am just about to state my under-
11 standing, that this goes towards the validity of the
12 assignment between United Berkeley, the original mortgagee,
13 and Republic, which is now claiming under this assignment
14 a recorded assignment in New Jersey and United Berkeley is
15 a party to the New Jersey action.

16 I repeat my position, your Honor --

17 THE COURT: Your position is, as I understand it,
18 that a judgment which will be rendered in this foreclosure
19 proceeding may be pleaded by you as a bar of this action
20 here, a bar of the defendants in this action as res judicata.

21 MR. SCHAUL: No. My position is that could be
22 set up on the basis of res judicata on the basis of a
23 determination of the amount under the mortgage and would
24 not relate --

25 THE COURT: That's a critical issue in this case,

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2 isn't it?

2 3 MR. SCHAUL: Certainly the amount due under any
4 mortgage is a critical issue, but our basic position in
5 this case -- our basic relief that we seek in this case
6 relates to ignoring whether or not in fact any money was
7 due under the mortgage because the mortgage required the
8 mortgagee to do certain things and we are saying now without
9 any justification, disregarding whether any amount was due,
10 Republic refused to perform the acts so that they were
11 clearly and unequivocally called to perform under the
12 mortgage document, with the result that we were unable to
13 convey land, we were unable to acquire property free of
14 the lien as had been contemplated by the mortgage instrument
15 itself.

16 THE COURT: And they excused their breach of
17 these provisions by saying that you were not in good
18 standing; that you were in default, isn't that right?

19 MR. SCHAUL: They have now stated that. We take
20 the position that in fact that was not the motivating
21 cause and in fact that the defaults that they allege only
22 gave them an option to accelerate the indebtedness, an
23 option which they never exercised.

24 THE COURT: Whether or not you were in default
25 depends on whether or not any money was owing that wasn't

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2 paid and that's a critical element in this case, isn't that
3 so? Your pleadings here seem to indicate that.

4 MR. SCHAUL: No, I don't think that's true, your
5 Honor, because the mortgage document calls for certain
6 seriatum determinations at various times of issues which
7 would arise as to whether Baypoint was entitled to a credit
8 against the mortgage for certain amounts that it had spent
9 and the issues relating to default arose before some of those
10 events had been expected to occur.

11 In other words, there were certain times at which
12 we could take the position that they had been unable to
13 convey to us property or we had been unable to clear up
14 liens against property allegedly conveyed which would have
15 been given us the right to a credit and they are saying now
16 that in advance of those times there have been certain
17 acts of default on our part which excuse them from their
18 obligation to give us the releases from the lien of the
19 mortgage that the mortgage itself called upon them to give
20 and that certain collateral undertakings they had given
21 to us at the time of the assignment called upon them to
22 give to us.

23 THE COURT: Perhaps you ought to tell me again,
24 assuming your client is uniformly successful in its
25 contentions in the Laird action, what facts the defendant

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2 will be collaterally estopped to deny?

3 MR. SCHAUL: If we were uniformly successful
4 in our proceeding before the New Jersey Court, it is our
5 opinion that the Court would determine that under the
6 mortgage contract there was no money due and we would
7 anticipate setting up that as a defense to any counterclaim
8 that Republic might raise in this Court that there is
9 money due under the mortgage, but that again would not
10 look towards the relief which we are seeking in this mortgage
11 which arises in our opinion whether or not any money
12 ultimately ever was due under the mortgage which is now
13 held by Republic. They were obligated to give us releases
14 upon the payment by us of certain sums of money to a prior
15 mortgagee. We paid those sums or we stood ready to pay
16 those sums of money, offered to hold the releases in escrow
17 contingent upon that payment and they in direct violation
18 of the terms of the contract refused to give us the releases
19 with the result that we have been sued for breach of
20 contract by certain contract purchases, we have lost certain
21 mortgage commitments -- all this is pleaded in the complaint
22 and the supplemental complaint -- and these have given
23 rise to the damages which we seek in this action.

24 As I stated in the affidavit, the validity of
25 this document is not in issue in this action except insofar

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2 as that word validity might be construed to include the
3 concept of after acquired property which very clearly under
4 New Jersey law as between a grantor mortgagee taking back
5 a purchase money mortgage for his own grant states that
6 after acquired property, acquired from a chain of title
7 other than that of the original grantor mortgagee does not
8 come under the lien of the mortgage.

9 THE COURT: All right, I suppose, Mr. Cooper,
10 briefly you can state your position for the record.

11 MR. COOPER: Our position, if your Honor please,
12 is that this action --

13 THE COURT: Before I leave Mr. Schaul, is this
14 order of Judge Wiley -- I have an undated copy attached here
15 apparently in December 1974 in the Laird case. Is that
16 still in effect?

17 MR. SCHAUL: I don't know that that order was
18 ever entered. To my knowledge it has not.

19 THE COURT: It is attached to the affidavit or
20 affirmation so-called.

21 MR. COOPER: It is a proposed order being
22 submitted which if it is signed, or unless Baypoint is
23 restrained from proceeding to have that order signed or
24 to act under it we are foreclosed.

25 THE COURT: You don't just hand an order like

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2 this to a judge out there without some indication or
3 ruling or direction on his part, do you?

4 MR. SCHAUL: Your Honor, as to the conclusion
5 of the motion here, under the New Jersey practice what
6 would have happened would be at the conclusion of the motion
7 proceeding, the moving party would submit to the Court a
8 proposed form of order.

9 THE COURT: Before the motion is decided?

10 MR. SCHAUL: There would have been certain
11 statements from the bench based upon which he would have
12 prepared this order and each party, the attorney for each
13 party in the action would receive a copy of the order
14 and would have a period of five days within which to state
15 that he either accepts the form of the order or he wishes
16 it put down for hearing to settle the form of the order
17 and whether the order actually states what the judge ruled
18 from the bench.

19 Now, I was not present at this --

20 THE COURT: You see, I think before I go into
21 the momentous act of staying the proceedings of the State
22 Court, which we are entitled to do in aid of our jurisdiction
23 which I feel very reluctant to do, I would like to know
24 precisely what is going on in the New Jersey Court. I have
25 been given an unconformed copy of the proposed order and

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as I gather it nobody knows for certain. Look at this paragraph 7 of this proposed order.

"Any and all determinations reached by the Court" -- and that means the New Jersey Court -- "at trial as between the parties shall be binding upon all parties to this litigation whether or not a particular party participates in the trial of the particular issue."

When I read that I can just see that there is something going on here which is attempting to oust this District Court of its jurisdiction and I won't have it.

MR. SCHAUL: Your Honor, I am sure that can be preserved and I would be willing to do that.

THE COURT: I think you better get on the phone with these South Jersey lawyers and straighten these out, otherwise I am going to make findings on the record this morning and I am just going to stay this Laird case to the extent necessary to protect the jurisdiction of this Court. This case isn't here by my choice. I think it may block in New Jersey, but it is here and it is here as a matter of right. If you can't work out something sensible here I am not going to have anything like this proposed paragraph 7 in this proposed order, which has apparently been submitted to Judge Wiley of the New Jersey Court.

MR. SCHAUL: Your Honor, may I just state the

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2 reason why perhaps the language is deficient, the reason
3 why I believe Paragraph 7 was placed into it? There are
4 extensive parties in the action, many of whom are in
5 default and many of whom are not participating.

6 THE COURT: I would like to see this foreclosure
7 proceed in New Jersey. I think the interest of Laird
8 Associates are involved in this case and they are not even
9 before me and they may be seriously hampered if there is
10 some delay or confusion. I don't want to be the cause
11 for that.

12 On the other hand, if we can't find a practical
13 manner in which this can be resolved it will simply be
14 necessary for me to make some type of equitable direction
15 here to protect this defendant from the claim of res judicata
16 over there.

17 MR. SCHAUL: Your Honor, I really think that the
18 only way in which Republic is to be affected by this order
19 is under Paragraph 2 of the order in which the Court says
20 that Republic will first try to establish the validity of
21 its mortgage and the amount of the balance due which they
22 are alleging in that Court is \$850,000.

23 THE COURT: I don't know what he means by that,
24 you see. It may be that he is dealing with this question
25 of the pari passu letter and I think if we get too detailed

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about how the State Court should conduct its business that is a mistake also. It will be better to stay the whole thing than to have some silly direction issue out of this Court as to what the order of trial will be in the State Court.

There is a recent case in this Circuit called Goldman Sachs against Edelstein directed against the Chief Judge of this District on the possible threat that the trial of a non-jury case might lead to a claim of collateral estoppel or res judicata and they stayed the entire trial and I am prepared to do the same thing if there can't be a little common sense in this case.

I want you to do this: I will give Mr. Cooper the courtesy because he hasn't been heard on the record, but I want you to take a recess and call those South Jersey lawyers whose names appear on this proposed order and find out what you can do with them and you tell them I have instructed you to advise that if this res judicata or collateral estoppel problem intrudes into this case to an extent where it deprives the Court of the opportunity to adjudicate the issues that have to be here, I just won't have it and I will stay the whole thing if need be or I will limit the stay and take some proceeding which will not be unduly harmful to Laird whose interests I think could

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2 be adversely affected.

3 MR. SCHAUL: Could I ask your Honor, would it
4 be possible for us to avoid this problem?

5 THE COURT: How can you discuss it if you don't
6 have the facts?

7 MR. SCHAUL: Could I consent in this Court to the
8 proposition that the New Jersey Court will not be asked by
9 Baypoint to determine anything other than the validity and
10 the amount due, if any, under the mortgage held by Republic?

11 THE COURT: You see, until you began your
12 argument here I thought there was no real substance to this
13 motion. I thought they were determining the validity
14 of the liens on real property, which is a wholly separate
15 issue. It is determined by the recording acts and they
16 are going to have a foreclosure and a sale and surplus
17 money proceedings which may take several months if it is
18 contested and if there are appeals. As soon as you finish
19 your discovery in this case we will come in and we will
20 try it, but as soon as you asserted to me that what you are
21 doing there is going to give you a bar of collateral
22 estoppel here, then it became a serious question and that
23 is why I sent for the Court Reporter because I didn't
24 visualize that problem until you asserted it, but now I am
25 on fair warning and I think you better take a recess and

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2 you better call your New Jersey counsel. It seems to me
3 your client ought to want this foreclosure to proceed down
4 there.

5 MR. SCHAUL: Yes, that is correct.

6 THE COURT: Certainly Laird should want it to
7 proceed and I don't think it's against the interests of
8 Republic unless they are going to be confronted with some
9 such claim. You have to remember that they are a national
10 bank and Congress in its manifest wisdom, which I don't
11 necessarily agree with, provided that the national banks
12 could move their transitory actions into Federal Court and
13 they did it and it is a matter of absolute right to them.

14 We used to have the Franklin National Bank doing
15 it every week here in this District. Once it was moved
16 then it became shifted from the New Jersey Court to here
17 by Judge Lacey's order and here it is. I have attempted
18 to proceed in a practical and sensible way with it, so what
19 you need to do is to get a recess and see if you can't
20 do something practical with the problem.

4 21 MR. SCHAUL: May I ask a question?

22 THE COURT: Certainly, but you know Mr. Cooper
23 has been very patient and I have excluded him from being
24 heard.

25 What is your question?

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2 MR. SCHAUL: Would your Honor feel the same way
3 if the New Jersey Court proposes to proceed to determine
4 the amount due under the mortgage contract by construing
5 its provision or adjustments?

6 THE COURT: I don't know how to answer that
7 question, but I would say this, that if the New Jersey Court
8 restricts its proceeding to adjudicating the lien on real
9 property and leaves open the contract and equity claims
10 which are asserted here -- and bear in mind you are a
11 plaintiff, you know. You are here as a plaintiff. You
12 can't forget that, but if they limit it to a foreclosure
13 action which will make an in rem determination as to what
14 I understand is a very lovely tract of property, a piece
15 of valuable property, if they will assert the terms of
16 the lien and effectuate a sale and have their surplus money
17 proceedings without violating the rights of the parties
18 to this Court so that this Court is not ousted of juris-
19 diction, that would be fine with me. I would see no ob-
20 jection to that and I would think if the bank took any
21 exception to that procedure they would be unreasonable.

22 MR. SCHAUL: How could they determine the priority
23 of the lien if they can't determine the amount of the lien?

24 THE COURT: It won't be res judicata here if
25 it is an in rem proceeding, if that's all they are trying,

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2 but you see what your people did down there, they tendered
3 these outside issues, these equitable issues. They are
4 going to have a foreclosure sale here and they are going
5 to determine the priority by the record. These are
6 encumbrances on the land records down there and these things
7 should be able to be done. It is only when you come back
8 here and assert that something has been litigated to the
9 detriment of the bank in that court -- that's the only
10 time that we have any problem here.

11 MR. SCHAUL: How can the New Jersey Court
12 determine the amount of debt without entering into the
13 questions of the various adjustments?

14 THE COURT: If they can I am going to stay the
15 foreclosure, if their determination is likely to be res
16 judicata or collaterally estop the bank. It is as clear
17 as that.

18 All right, Mr. Cooper. No discourtesy has been
19 intended for you. You are going to be heard, but the most
20 important thing is for counsel to call his New Jersey
21 clients. Maybe you can work out something practical.

22 MR. COOPER: I have tried with Judge Wiley in
23 New Jersey. I have made motions there. I have appeared
24 before him. I have argued this whole question out and
25 to no avail, otherwise we wouldn't come here and ask for

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2 the relief, which is extraordinary relief. We recognize
3 that. What I would suggest as a practical matter is the
4 utilization of 42(b), because under 42(b) we can sever this
5 whole area of dispute and have it resolved probably before
6 they even get to the trial in New Jersey coupled with a
7 stay against Baypoint from proceeding.

8 Now, if I may just make one addendum here.

9 THE COURT: If I make any stay against Baypoint
10 proceeding in New Jersey it will be as limited as I can
11 make it and it will be only after they have exhausted some
12 reasonable means of avoiding a stay and I expect you to
13 maintain the posture of clean hands and if you can find
14 a way of stipulating so I can avoid making a stay I expect
15 you and your client to do that because a stay is addressed
16 to the conscience of the Court, but as far as giving you
17 a split trial, we just have too heavy a docket of cases
18 here to give somebody a split trial on a civil case. I
19 have a very substantial criminal case with a requested
20 jury which I am going to start to try. You are not ready
21 to go with me tomorrow or Monday.

22 MR. COOPER: I am.

23 THE COURT: You are not. You don't have any
24 pre-trial order and according to what I was told the last
25 time you folks were here the discovery wasn't complete.

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2 MR. COOPER: It has been completed by them. We
3 have gone all the way.

4 THE COURT: Also I have to state to you that there
5 is a practice in this court to try criminal cases ahead of
6 civil, jail cases ahead of cases where the defendants are
7 out on bail and then to take the civil cases in their order
8 of filing and what you want here is a preference. I don't
9 incline toward that unless it is unavoidable. So you
10 better address yourselves to this problem. Use a little
11 common sense here, but you can't ask Mr. Schaul to do any-
12 thing here until he knows the precise status of the matter
13 in New Jersey and I have a suspicion that if he would
14 tender the issue of the New Jersey attorneys down there
15 they might find a very simple manner in which they could
16 obviate the difficulty, so my suggestion is you take a
17 recess, call them and then talk with Mr. Cooper.

18 MR. COOPER: May I read one thing into the record
19 for your Honor?

20 THE COURT: Yes, certainly.

21 MR. COOPER: I am reading now from the pre-trial
22 order signed by Judge Wiley.

23 THE COURT: Is that before me?

24 MR. COOPER: It is before you to this extent,
25 that this frames the issue that Mr. Schaul is talking about

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2 which requires that we get some relief from this Court.
3 He says, "As to Republic National Bank, ultravirus acts,
4 acts on the part of United Berkeley, consideration
5 indispensable party, validity and construction of assignment,
6 fraud, misrepresentation, default, unclean hands, estoppel,
7 waiver, no money due, setoff, breach of contract, standing
8 -- whatever that means -- statute of frauds, mandatory
9 arbitration provisions, binding effective
10 arbitration work, laches and right of foreclosure and
11 privity of contract."

12 Now, if that doesn't superimpose upon the issue
13 in the New Jersey Court the very basic question that we
14 have raised by them in this Court --

15 THE COURT: I think what you ought to try down
16 there is whether the plaintiff Laird is entitled to a
17 judgment of foreclosure and sale and whether the liens are
18 pari passu or not on the real property and then a chancellor
19 ought to go ahead with the sale, direct the sale and have
20 the surplus monies being paid in court. It is going to
21 take you four to six months to do that and by that time
22 you ought to be able to come in and try this case.

23 MR. COOPER: We would have no objection if that
24 would be required of Baypoint.

25 THE COURT: You could do all those things without

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2 raising a spector of res judicata.

3 MR. COOPER: That's satisfactory to me.

4 THE COURT: Can't you do that, Mr. Schaul?

5 MR. SCHAUL: Your Honor, it is unfortunate that
6 the real estate market in that area has collapsed.

7 THE COURT: It may come back.

8 MR. SCHAUL: Not in the reasonably immediate
9 foreseeable future. There will be no surplus monies at
10 this foreclosure.

11 THE COURT: Is that really so? Do you all
12 concede that? Your bank must know what the answer is to
13 that.

14 MR. COOPER: All we know is that we have seen no
15 likelihood at this time of anyone bidding in for the mort-
16 gage except the first mortgagee, who has since started
17 the foreclosure action.

18 THE COURT: Then why don't you save all the
19 problems because what do you get? Why don't you just go
20 down there and consent to a judgment of foreclosure and
21 sale and go to the auction.

22 MR. COOPER: We have no problem on that. If
23 the Court in New Jersey would limit itself to the in rem
24 proceeding before it. We have no quarrel with that procedure,
25 but we are certainly entitled to be protected against a res

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2 judicata determination.

5 3 THE COURT: I understand that. You don't have
4 to repeat that argument. I think it is quite clear in the
5 papers. I think there is some substance to it under the
6 decided cases in this Circuit. I think this Court has
7 to protect its jurisdiction under this Title 12 which I
8 mentioned before which some day ought to be repealed, but
9 until it is it is my duty to uphold it.

10 You know how I feel about national banks coming
11 in here and taking an unfair advantage of their customers
12 that way, but that's the law and it is my duty to uphold
13 it.

14 MR. COOPER: We didn't enact it either.

15 THE COURT: I know you didn't. I am not finding
16 fault with anybody.

17 Please take a recess and see if you can't do
18 something with this problem. Let the Clerk know as soon
19 as you have completed your telephone calls.

20 [Recess.]

21 MR. SCHAUL: Your Honor, I have spoken with New
22 Jersey counsel and they tell me several things. First,
23 the proposed order that is attached to Mr. Cooper's
24 affirmation has not been signed since the attorneys for the
25 bank have entered an objection to it. He tells me that a

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2 transcript is being prepared of the hearing before Judge
3 Wiley on that motion. He tells me --

4 THE COURT: What is the significance of that?

5 MR. SCHAUL: First of all, what does that proposed
6 order mean? That was in issue. Apparently that is a
7 question and a transcript is being prepared to determine
8 whether that order does fairly comply with what he was
9 saying. Apparently the sense of what he was saying from
10 the bench at the time -- I am talking about Paragraph 7
11 of that order -- was that he was bifurcating the issue of
12 Republic out of the trial and he wanted to be sure that
13 other parties who might not participate in that bifurcated
14 section of the trial would be bound by any decision that
15 might be made there.

16 They tell me that the scheduling of the trial
17 has been adjourned to March sometime and that they anticipate
18 nothing happening in connection with the trial until March.

19 THE COURT: March will be here before you know
20 it and if you can't straighten it out I am going to grant
21 the motion at least in part. I tried to tell you that
22 before we took the recess. I was hopeful that these New
23 Jersey fellows could give you a suggestion. I have been
24 thinking about it myself since we recessed and it seems
25 to me that the issue of whether two mortgages are in pari

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2 passu or whether they are of equal lien, which I suppose
3 is an easy way to express it, is entirely proper to be
4 tried there. That's between the Laird parties and this
5 bank and it affects the lien on the real property and
6 the question of whether Laird's mortgage is in default or
7 whether Laird is entitled to a judgment of foreclosure and
8 sale is a very simple question that is entirely proper to
9 be tried there and if you tried those issues and resolved
10 them you might find that the whole rest of the New Jersey
11 litigation would become academic.

12 MR. SCHAUL: I wonder if we could have a short
13 adjournment to give us an opportunity to evaluate the
14 situation as it concerns the two lawsuits.

15 THE COURT: I am ordinarily very favorably
16 inclined towards reasonable adjournments in matters with
17 the hope that people can work it out, but my position on
18 this is relatively clear and I am prepared to dictate my
19 findings and conclusions and put them on the record while
20 all this is fresh in our minds.

21 You had your chance to call New Jersey and you
22 came up with a big nothing. You told me that the transcript
23 is being prepared. I don't know what possible inference
24 I am to draw from that fact because your client's New
25 Jersey lawyers submitted this order and I assume they did

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2 so in good faith and as an ethical discharge of their duties
3 to that Court.

4 I have no basis for assuming that that order is
5 an unjustified submission. I think we ought to resolve
6 this. This Court is too busy to be a party to whipsawing
7 between two forums and this proposed order your people
8 submitted down in Jersey as an awful big red flag on it.

9 MR. SCHAUL: Your Honor, what I am suggesting
10 is nothing is going to happen in the New Jersey action I
11 am informed until March. The only things which might occur
12 would be additional discovery and I am willing to represent
13 that as a fact on the record here.

14 THE COURT: Well, this pre-trial order will be
15 entered, you see.

16 MR. SCHAUL: That was entered a substantial period
17 of time ago.

18 THE COURT: That's the order we are talking about?

19 MR. SCHAUL: Yes -- no.

20 THE COURT: The one that he gave me an unconformed
21 copy of, the December order.

22 MR. SCHAUL: I am willing to represent that we
23 will refrain from taking any action on it. We will request
24 to put that off.

25 THE COURT: I think I ought to decide this. It

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2 is deteriorating into nonsense.

3 MR. COOPER: I agree. We would be coming back
4 and forth --

5 THE COURT: No, you won't be coming back. If I
6 have to enter any preliminary injunction, which is what
7 I am proposing to do, I am going to have to give this case
8 a preference, and I don't want to hear anything from the
9 back or anybody else that they are not ready to try it.
10 I want you to go directly to a magistrate and get a pre-trial
11 order in this case and I don't want any of this old-fashioned
12 lawyery in this case of I haven't deposed somebody or he
13 hasn't answered a question. I won't have it.

14 You are here seeking equity. You are getting
15 equity. I am not just addressing myself to you, Mr. Cooper,
16 I mean your clients also. This case, as soon as I finish
17 my criminal pending matters, I am going to call it in.

18 How long will it take?

19 MR. COOPER: Two days.

20 MR. SCHAUL: I think it will take substantially
21 longer.

22 THE COURT: I don't think it will take substantially
23 longer, but two days is a little optimistic from the way
24 the pre-trial conferences have been going.

25 MR. SCHAUL: It is a matter of documents and
recordation.

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1 THE COURT: This case can't be a matter of
2 documents. If your client has engaged in the manner as
3 charged they didn't to it by way of documents. I hope
4 somebody sits down and reads how these charges are going to
5 be proved or disproved.
6

7 All right, I am going to make the following
8 findings of facts and conclusions of law.

9 The motion of the defendant Republic National
10 Bank by notice of motion undated filed in this Court
11 January 2, 1975 should be granted, at least in part, and
12 I am going to direct you to settle an order on ten days'
13 notice.

14 The facts are as follows:

15 One approximately April 30, 1973 the plaintiff,
16 Baypoint Corporation, filed an action in the United States
17 District Court for the District of New Jersey in which it
18 named as defendant the Republic National Bank of New York,
19 which as its name implies is a national bank association
20 located in this District at Fifth Avenue and Fortieth
21 Street. It was a diversity action brought by the plaintiff
22 Baypoint Corporation. Several course of action or counts
23 were pleaded.

24 By the first count the plaintiff alleged that it
25 was the owner of real estate in Berkeley Township, Ocean

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County, New Jersey and that it subjected that property to a purchase money mortgage in favor of United Berkeley and that certain agreements existed between itself and United Berkeley and that defendant Republic became the successor in interest of United Berkeley and failed to comply with those agreements by its assignor and the plaintiff asked that the Court fix and determine the amount owed by the defendant to the plaintiff under these agreements, if any, and grant such other and further relief as might be equitable and just.

By the second count the plaintiff requested an order compelling the defendant to deliver releases of certain lots from the lien of the mortgage upon payment by the plaintiff to the first mortgagee of certain sums of money, the first mortgagee being apparently a different mortgagee.

On the third count the plaintiff sought damages arising out of the breaches on the part of the defendant of the contract rights referred to in the first and second count. Both compensatory and punitive damages were requested.

In the fifth count the plaintiff asserted that it could not determine the amount of interest to be paid or the amount of principle due on the mortgage until the first count was adjudicated and sought declaratory relief

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2 that it need make no interest payments until that amount
3 was determined and sought other relief.

4 The fourth count charged the defendant with
5 making a wrongful assertion that the mortgage covered after
6 acquired property and probably not yet acquired and refused
7 to give releases.

8 The defendant's amended answer was filed in this
9 Court on July 2, 1973 and I won't characterize that pleading
10 except to say that it is apparently a general denial and
11 it pleads certain affirmative defenses, all of which are
12 set forth therein.

13 After the action was initiated a proceeding was
14 brought before the Honorable Frederick Lacey of the District
15 Court in New Jersey and as a result of that motion or
16 application that Court correctly determined that the
17 defendant was a national bank and that the bank had an
18 absolute right to have the venue of the action laid in
19 this Court pursuant to Title 12 of the United States Code,
20 Section 94 and on June 1, 1973 Judge Lacey of the District
21 of New Jersey ordered that the case be transferred to this
22 Court and that the defendant has ten days from the date
23 unless further extended by the transferring Court to respond.

24 There has been some pre-trial discovery in this
25 action. There is no pre-trial order as yet entered. The

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2 Court has held several pre-trial conferences.

3 In the interim it appeared that an organization
4 known as Laird had started a foreclosure action in the
5 State Court of Ocean County, New Jersey to foreclose
6 another mortgage; that in that mortgage foreclosure action
7 Laird was asserting that its mortgage was equal to or
8 superior to the mortgage held by the bank and furthermore
9 that on the consent of all counsel at a pre-trial hearing
10 on March 13th, 1974 this action here was stayed and
11 transferred to the suspense docket of this Court by an order
12 which I made on consent dated March 13, 1974 which stayed
13 the action pending a determination by the Superior Court
14 of the State of New Jersey fixing and determining the
15 amount due, if any, upon the indebtedness secured by the
16 mortgage referred to in the complaint or until the further
17 order of this Court.

18 Thereafter a motion was made by Republic to vacate
19 the stay which had been entered on consent. The motion was
20 granted by an order dated December 3, 1974 and the action
21 was rescheduled as an active case and transferred from
22 the suspense docket of the Court and the stay of March 13
23 which had been made on consent was vacated.

24 The Court then directed that discovery should be
25 resumed and should be conducted with diligence and implicit

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1 in that direction was that the foreclosure proceedings in
2 New Jersey would go forward and the Courts declined at
3 that time to restrain the foreclosure action in New Jersey
4 and concluded at that time that this case should be tried
5 after the trial in New Jersey.
6

7 The Court had then been advised, it turns out
8 erroneously, that the trial was scheduled to begin January
9 25, 1975. I now find that is not so, that the trial is
10 presently scheduled for some date in March and it really
11 isn't known, at least by this Court, when that trial will
12 be held.

13 In the proceedings in the New Jersey Court,
14 Baypoint, which is the plaintiff in this action, submitted
15 a pre-trial statement of the issues to be tried. A fair
16 reading of the portion quoted in the affirmation of Mr.
17 Cooper which is before me on this motion indicates to the
18 Court, and I find, that the Baypoint Corporation proposes
19 to try in that foreclosure proceeding the transitory issues
20 which the bank has a right under the Federal Statute to
21 try in this venue and that it proposes to obtain a judgment
22 there which it believes will be res judicata or collateral
23 estoppel as to those issues in this case and which deprive
24 the defendant of its rights to try this action, which
25 incidentally was not initiated by the bank, but by Baypoint.

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This conduct is inequitable and it threatens to oust this Court of its jurisdiction in this action and it is necessary in aid of the jurisdiction of this Court to issue at least a limited injunctive order to prevent this conduct.

In the pre-trial statement submitted by Baypoint in the Laird foreclosure action the issues sought to be litigated in that case included the question of whether or not a certain assignment was ultra vires, whether it was supported by consideration, whether Republic was guilty of unclean hands in its conduct of the entire transaction with Baypoint and by its own conduct estopped from asserting the claims arising under the lien of the mortgage.

Furthermore, the Court over there apparently decided a motion. Where is that proposed order found?

MR. COOPER: It is attached to my moving papers, if your Honor please, the notice of motion.

I have another one here if it will be convenient.

THE COURT: I have it, but it is just that there is a lot of papers up here.

On December 13, 1974 it appeared that the Superior Court of New Jersey in the Chancery Division heard a motion on the instance of Baypoint and another defendant in that foreclosure action and the Court infers that the proposed

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1 order was submitted properly; that the lawyers who prepared
2 it and filed it were acting in an ethical fashion in
3 attempting therein to reflect correctly what the New Jersey
4 Court had directed at the argument, although the Court
5 recognizes that there has been some dispute as to the form
6 of that proposed judgment and that the precise form of
7 judgment has not yet been signed, and when I say judgment
8 I really mean to refer to it as an order.
9

10 That proposed order provides or purports to
11 provide that Republic must proceed first in its attempt to
12 establish the validity of its mortgage and the balance due
13 and that upon the completion by defendant Republic of
14 its presentation the defendant Baypoint is to proceed with
15 its defenses against Republic as well as establishing its
16 counterclaim against Republic for discharge of its mortgage,
17 but to do so would require that Court to determine all of
18 the issues which are before this Court in this action and
19 the order as proposed to Judge Wiley of the New Jersey
20 Court proceeds further to establish that upon completion
21 of the issues between Republic and Baypoint, then and only
22 then will the plaintiff Laird who initiated the foreclosure
23 action in the first place proceed in its action to foreclose
24 the mortgage as alleged in its complaint.

7
25 The most egregious provision in that proposed

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2 order is found in Paragraph 7 which says:

3 "Any and all determinations reached by the
4 Court at trial as between the parties shall be binding
5 upon all parties to this litigation, whether or not a
6 particular party participates in the trial of the particular
7 issue."

8 The effect of that is that it is impossible for
9 this defendant in this case to protect its rights by
10 absenting itself from the New Jersey litigation and there
11 is an attempt there at the instance of Baypoint to reach
12 out and try in that case in effect all of the issues except
13 the claim for punitive damages, which is asserted in this
14 case and that is an improper attempt. It is inequitable
15 in that it attempts to indulge in a form of shopping of
16 the worst sort. It is unconscionable conduct which this
17 Court will not or cannot permit nor will this Court permit
18 itself to be ousted of its jurisdiction in this action nor
19 allow the defendant bank to be deprived of the privileges
20 granted to it by Title 12 of the United States Code with
21 respect to the transitory claims.

22 The Court includes that limited injunctive relief
23 should be granted which will prevent achievement of any
24 judgment or decree in the New Jersey Superior Court in the
25 Laird foreclosure action which will have the effect of

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constituting a bar of judgment or a defense for affirmative basis for the assertion of collateral estoppel or res judicata as to the underlying issues in this case.

The Court believes, however, that it is perfectly proper for the New Jersey Court to proceed with the foreclosure of the Laird mortgage and with a sale of the mortgaged premises free and clear of all liens in accordance with its regular proceedings; that there is no reason why that Court should not be in a position to litigate with finality the relative parity or precedence of the liens of Laird and Republic National Bank on the property, and furthermore that there is no reason why a determination which is entirely in rem and which pertains to the title of the property in which Laird has an interest, there is no reason why that shouldn't be litigated there with finality and the Court doesn't propose to impede any of that proceeding at all.

A proper order must be settled on notice which will have that effect.

Now, to do otherwise would oust the jurisdiction of this Court and although I regret greatly impeding any State Court proceeding, I feel there is no alternative, in view of the failure of the parties to agree upon an equitable means of proceeding with both actions, which I really think could be done, but it has been impossible of

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2 achievement in spite of efforts made which this record
3 will show.

4 I find that Republic National Bank would be ir-
5 reparably damaged if forced to litigate the issues which
6 they purport to intend to have litigated in that Court
7 while this action is pending and I am relying in part on
8 the somewhat expanded view of the questions of collateral
9 estoppel and res judicata as set forth in the recent order
10 of the Court of Appeals of this Circuit. I don't have the
11 citation presently before me, but it is a reported and
12 well known case entitled Goldman Sachs & Company v. Edelstein
13 as District Judge.

14 There a mandamus was issued against the District
15 Judge to prevent the holder of a non-jury trial where the
16 facts to be found in that trial might conceivably be
17 available to the plaintiffs in other jury cases under series
18 of res judicata or collateral estoppel or claimed preclusion,
19 however you may wish to characterize that theory.

20 Since that threat exists it is proper that the
21 bank have reasonable protection from it, but this Court
22 wants to make the limitation or interference with the
23 State Court minimal and not to impede the rights of Laird
24 or the rights of Baypoint to litigate with Laird.

25 That basically constitutes my findings and con-

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MAR 10 1975

LAW OFFICES

FARR, REIFSTECK, WOLF
HADDON HEIGHTS, N. J. 08035

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----X
4 BAY POINT CORPORATION,

5 Plaintiff,

6 - against -

7 REPUBLIC NATIONAL BANK OF NEW YORK,

8 Defendant.
9 -----X

73 Civ 2549

36 B

10 Before:

11 HON. CHARLES L. BRIEANT, JR.,
12

13 District Judge

14 New York, N. Y.

15 February 28, 1975 - 9:30 a.m.

16 Appearances:

17 FARR, REIFSTECK & WOLF, Esqs.
18 Attorneys for Plaintiff
BY: WALTER T. WOLF, Esq.

19 HERMAN E. COOPER, Esq.
20 Attorney for Defendant

21 AUGUST ROSENBERG, Esq.
22 Deputy Attorney General, State of New Jersey

23 EVOY & FEINBERG, Esqs.
24 Attorneys for Laird Associates
BY: ALEXANDER FEINBERG, Esq.
25 WARREN G. EVOY, Esq.

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1 MR. COOPER: If your Honor please, I have the
2 pleasure of introducing a bevy of members of the New Jersey
3 bar who are distinguished in their own right as well as in
4 this litigation. Mr. Walter T. Wolf.
5

6 THE COURT: Mr. Wolf.

7 MR. WOLF: Good morning, your Honor.

8 MR. COOPER: Who asks to be granted the considera-
9 tion of appearing on behalf of the defendant.

10 Mr. Alexander Feinberg, similarly, Laird Associates,
11 and Warren G. Evoy.

12 Mr. Rosenberg, Assistant Attorney General of the
13 State of New Jersey.

14 MR. ROSENBERG: May I correct that to Deputy.

15 MR. COOPER: My promotion was not intentional.
16 And except for that, I stand here alone.

17 THE COURT: I think in New York a Deputy Attorney
18 General outranks an Assistant.

19 MR. ROSENBERG: And I must admit in New Jersey the
20 Assistant outranks the Deputy.

21 MR. COOPER: That is why I had him promoted.

22 THE COURT: In any event, why don't any of you who
23 are not actually speaking find chairs. If you, sir, want to
24 draw a chair up to the front table, I would be perfectly glad
25 to hear you.

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2 MR. ROSENBERG: I would also like to be heard.

3 THE COURT: Of course. But I only hear one at a
4 time. All right. I have two motions here, as I understand
5 it. I have not had a chance to give consideration in any
6 depth to the papers, but there is a motion to vacate the
7 prior stay. There is also another motion to enforce the
8 stay.

9 Is there an appeal pending?

10 MR. COOPER: There is no appeal, your Honor.

11 MR. FEINBERG: Is it your Honor's practice or
12 desire that counsel who are not speaking take the table to
13 the rear?

14 THE COURT: No, you may all share the same table
15 in this particular situation if you like, assuming there
16 are enough chairs there.

17 I think I should hear the motion to vacate or
18 dissolve the stay first, because that might obviate the
19 other motion. Who wishes to be heard in support of that
20 motion?

21 MR. WOLF: If I may, your Honor.

22 Your Honor, I am Walter Wolf. I am with Farr,
23 Reifsteck & Wolf, who are the attorneys representing the
24 plaintiff in this matter, Bay Point Corporation. However,
25 we represent the corporation in the litigation that is

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2 ongoing in New Jersey.

3 THE COURT: You represent Bay Point?

4 MR. WOLF: Yes, sir.

5 THE COURT: But Bay Point is not seeking to dissolve
6 my stay -- oh, you are. All right. I thought it was just
7 the Laird interests.

8 MR. WOLF: Bay Point is moving, and the moving
9 papers were filed and prepared by Mr. Schaul, who has
10 appeared before you before, and specifically of course on
11 January 9, 1975. He had a prearranged vacation which
12 obviated his appearance in this matter.

13 The application is for a dissolving of the stay
14 which you had granted on January 9 and was found in an
15 order which you subsequently signed.

16 I believe that the factual reasons for the relief
17 requested are found in Mr. Schaul's affidavit, and the
18 legal reasons are found in the memorandum which I prepared,
19 filed and served on all the parties that have an interest
20 in this litigation.

21 Your Honor, essentially, and without attempting to
22 repeat what you already have before you in terms of the
23 affidavit and the brief, we are in this position: On
24 January 9, as a result of some off-the-record comments
25 apparently made in chambers between counsel, you went on

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2 the record -- and the record will speak for itself -- in
3 terms of your Honor's interpretation of the application of
4 12 USCA section 94. I refer to this as a venue statute,
5 which is the title of that statute, and I also make
6 reference to the anti-injunction section of Title 28,
7 section 2283.

8 Our position very simply is that there is a general
9 prohibition against injunctions issuing in the federal court
10 to restrain state court proceedings.

11 THE COURT: It has an exception in it, does it not?

12 MR. WOLF: My notes indicate that the next point I
13 was going to cover was the exception relating to the
14 granting of an injunction as necessary in aid of the
15 court's jurisdiction. Obviously, if section 94 is a
16 jurisdictional statute, there is something to talk about,
17 and it is our legal position that this is not the case, that
18 it is a venue statute.

19 THE COURT: I don't doubt that it is a venue
20 statute, but your client initiated this federal court
21 litigation in New Jersey.

22 MR. WOLF: That is correct.

23 THE COURT: You selected this forum and you
24 tendered to the federal court the controversy that you had
25 with the bank over there; then they moved it here. The

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2 discussion concerning Title 12 between Mr. Cooper and
3 myself was really a sort of a subsidiary philosophical
4 question. I really think the case should have been left
5 where your client brought it.

6 MR. WOLF: So do I.

7 THE COURT: But there is nothing I can do about
8 that.

9 MR. WOLF: If you can't, I can't.

10 THE COURT: I am hearing you.

11 MR. WOLF: Your Honor, I think that if the matter
12 had been dealt with on the two briefs that were filed by
13 Bay Point before Judge Lacey, these problems would never
14 have arisen.

15 THE COURT: You see, I regard this as a transitory
16 action, not an action in rem affecting the property.

17 MR. WOLF: When you say this, you mean the com-
18 plaint and supplemental complaint.

19 THE COURT: This present case that is here before
20 me.

21 MR. WOLF: Whether it is or it is not, for purposes
22 of this motion, as our brief indicates, I am assuming that
23 it is. The fact remains that the foreclosure started by
24 Laird in New Jersey is an in rem action, it is a local
25 action, if I can use some terminology borrowed from the

2 cases under section 94, and any intrusion by the federal
3 court in New York in that aspect I think creates a problem.
4 And while I agree that this suit was started first by
5 Bay Point in the federal court, we didn't start the Laird
6 suit; Laird did. WE are a party defendant just as Republic
7 is. And Republic has voluntarily entered into that
8 litigation by counterclaiming against Laird in the state
9 court litigation and cross-claiming against Ba. Point.

10 Quite frankly, we are in this position: They are
11 apparently at liberty to litigate their rights as they see
12 them affirmatively against the plaintiff Laird, Bay Point,
13 and whereas we are now finding ourselves under a restraint
14 to do the same thing with respect to them.

15 THE COURT: What affirmative relief is the bank
16 seeking against Laird?

17 MR. WOLF: They want to claim a priority in terms
18 of their mortgage, among other things.

19 THE COURT: You wouldn't even have to plead that,
20 would you, a local real estate action in New Jersey?

21 MR. WOLF: They could have filed an answer and
22 asked that their lien be reported upon and heard upon
23 priorities, that is right.

24 THE COURT: They are not seeking affirmative
25 monetary damages or affirmative relief against Laird; they

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2 are just becoming parties to a foreclosure in which if there
3 is any surplus moneys the Court would have to see who has
4 priority. Isn't that right?

5 MR. WOLF: Well, you use the word "just," and I
6 don't want to be bound by your use of that word when I say,
7 "that is correct, your Honor." And if I can just say that
8 when you say they "just" want to do this, that, and the
9 other thing, the fact is we are talking about, in terms of
10 Republic, by their own statement, six or eight hundred
11 thousand dollars -- I have forgotten the exact amount.

12 MR. FEINBERG: Eight hundred fifty.

13 MR. WOLF: The plaintiff Laird is seeking \$410,000
14 plus, and Fidelity Mortgage Investors, who is the first
15 mortgagee, is in there to the tune of in excess of \$3,000,000.
16 Now, when you are talking priorities at that level on a
17 piece of land that hopefully exceeds the first mortgage, I
18 think we are talking about a matter of real substance and,
19 taken in context with Mr. Schaul's discussion with you,
20 brief as it was, about the likelihood of there being a
21 genuine bidding at the Sheriff's sale such as would generate
22 surplus moneys, I think it is a matter of real substance
23 that Laird is talking about and Republic is talking about.
24 Because where there is not going to be any surplus moneys,
25 junior lienors are in there for their last fight. This is a

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2 corporation and there is not going to be anything left
3 over after the land is sold. There is an after-acquired
4 title question lurking in the background here which affects
5 FMI and which has been raised by Republic and as well as
6 by Laird.

7 THE COURT: Understand that I am not a New Jersey
8 practitioner and I don't hold out any special knowledge as
9 to how they administer mortgage foreclosures, but I assume
10 the practice cannot be too greatly different from New York.
11 I would think that there would be no problem whatever in hav-
12 ing a judicially supervised sale of the property. If you
13 have nothing more than is necessary—that is necessary to
14 satisfy the costs and the tax liens on the first mortgage,
15 then there is nothing he is to fight about, is there?

16 MR. WOLF: I know you said this in the record on
17 January 9, but that is a point of view --

18 THE COURT: Nobody has ever answered the point.

19 MR. WOLF: Well, then let me. I know that that
20 point of view is shared by Laird, and I know it is shared
21 by FMI, but they are plaintiffs and they contend that they
22 have valid, in one case first, and in the other case second,
23 mortgages. Laird contends to some extent that they have a
24 first one.

25 Be that as it may, I represent the mortgagor. I

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2 want to litigate a number of things which go to the very
3 essence of whether in fact there is a mortgage or not.

4 THE COURT: Which are the things you want to litigate
5 in Jersey in the foreclosure? What are the issues?

6 MR. WOLF: Well, they are listed in the pretrial
7 order and they are mentioned in the record on January 9
8 by Mr. Schaul. I don't have the pretrial order with me.

9 THE COURT: I am asking you to put it in simple
10 terms, because my hope is that there would be a practical
11 approach to this entire problem. We don't need to have
12 proliferating litigation here.

13 MR. WOLF: I agree.

14 THE COURT: There should be a practical approach
15 here. You have the parties here today. We are fortunate
16 that we have Laird here. We ought to be able to come to
17 some reasonable arrangements.

18 MR. WOLF: Here is what I think would be the
19 practical solution.

20 THE COURT: Before you talk about what you think
21 would be practical, just verbalize for me, if you would,
22 what issues of fact or law you want to litigate in New
23 Jersey that you are prevented from litigating.

24 MR. WOLF: With respect to Republic?

25 THE COURT: Why don't you start from the beginning?

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2 I assume you have contests with the mortgagees, don't you?

3 MR. WOLF: Well, we have major issues with
4 respect to FMI, Laird, and Republic. As to Republic, we
5 are contending that -- and I quote now from page 22 of the
6 record of the transcript --

7 THE COURT: Don't quote. Just give me the
8 substance of the point. Explain it to me.

9 MR. WOLF: We think that the mortgage that was
10 created by Bay Point -- that is, the purchase money
11 mortgage -- was fraudulently assigned by the seller, United
12 Berkeley Realty Enterprises Association, to Republic National
13 Bank.

14 THE COURT: That would be totally academic unless
15 there is some money available for that mortgage, isn't that
16 right?

17 MR. WOLF: I don't think it would be totally
18 academic, especially when you are dealing with a litigation
19 here in New York, no.

20 THE COURT: So you are really trying to get the
21 litigation in New York determined over there, then, aren't
22 you?

23 MR. WOLF: Your Honor, whether that is the case or
24 not is up to you.

25 THE COURT: That is the problem I face here. You

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2 see, I view this as a foreclosure action in New Jersey
3 which ought to proceed, and that it ought to proceed, first,
4 by selling the subject property and seeing what is involved
5 here, and if there is no money for the second and third
6 mortgagees, then there is nothing to fight over there.
7 There is no local action, there is no res. You have a
8 mortgage that is under water. If there is a successful sale
9 two things happen: you have stopped the running of your
10 charges, you have stopped the running of your taxes, which I
11 assume are prior to all the mortgages, they must be, real
12 estate taxes; and you will know whether there is any issue
13 of priority of lien. If you have an issue about the priority
14 of liens where there is nothing to have a lien on, it is a
15 useless waste of lawyer's time, isn't it?

16 MR. WOLF: I suppose that would be true, in hind-
17 sight.

18 THE COURT: You see, I got the impression that
19 they were trying to ease this case out and get it attended
20 to over there, and thereby attempting to oust this court of
21 jurisdiction, which surprisingly your client first sought,
22 and that in aid of this court's jurisdiction, to prevent
23 this action from being mooted in that fashion, by trying to
24 raise these issues in what really is an in rem action with
25 no res, that it was appropriate to enter injunctive relief

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2 in aid of the jurisdiction of this court.

3 MR. WOLF: Judge, it is just the opposite.

4 THE COURT: All right, maybe it is.

5 MR. WOLF: We did not ease it back in New Jersey.
6 It was eased up here by Republic.

7 THE COURT: Because you started the federal case
8 with full knowledge of the effect of Title 12.

9 MR. WOLF: We started a diversity suit, which was
10 met with a motion to transfer.

11 THE COURT: That was obvious to you the day you
12 read the caption and it said Republic National Bank in the
13 caption.

14 MR. WOLF: Well, I wasn't around at that time.
15 I can't take credit or blame. But whatever the case may
16 be, that was done.

17 After it came up here, you entered an order which
18 I thought was a logical solution, and frankly this is what I
19 am seeking right now: to let us litigate our matters down
20 in New Jersey, and forget what Bob Schaul or Walter Wolf or
21 Judge Wiley or anybody else says about adjudicating issues
22 with respect to Republic. You up here can or cannot apply
23 equitable estoppel or collateral estoppel principles as you
24 see fit. And I can only say that nothing has been done with
25 finality, no judgment has been entered, no orders have been

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2 entered against Republic to this moment. I think for that
3 reason alone there should not be injunctive intervention,
4 because no harm can come to Republic unless the harm comes
5 in the State of New York.

6 THE COURT: Why do you say that?

7 MR. WOLF: Because we are parties in this federal
8 court litigation in New York, and since the Laird suit is
9 strictly an in rem action and since no personal judgments
10 of any sort can be entered in that case, there is absolutely
11 no possible way that Republic can be bound in New York except
12 as you would allow it to be bound.

13 THE COURT: Please tell me what is the possible
14 purpose of litigating the issue of whether they committed
15 a fraud in effecting the assignment if they are not going
16 to be bound by the result of that litigation? You don't
17 try cases to get judgments that don't bind people, do you?

18 MR. WOLF: No. But if I can knock out a lien in
19 New Jersey, I am going to do it in a mortgage foreclosure
20 suit. Because the outcome of the sale to some extent
21 depends upon the litigation that preceded the judgment. And,
22 frankly, there are other provisions in the purchase money
23 mortgage which we seek to litigate with Republic, such as
24 the arbitration provision in the mortgage and the fair price
25 adjustment.

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2 THE COURT: Suppose you are uniformly successful
3 in all of your litigation over there, assume that it is
4 permitted to go forward, what good does it do you if it is
5 not going to be binding on Republic in some other case in
6 some other forum?

7 MR. WOLF: I am not personally conceding that it
8 won't be.

9 THE COURT: That is why I am issuing an injunction.
10 It is as clear as that.

11 MR. WOLF: I understand your outlook, but you are
12 assuming that it automatically binds Republic, that is, the
13 determination in New Jersey. What I am saying is, the cases
14 indicate that whether it does or it does not depends on the
15 forum in which the litigation that follows is brought, namely
16 your court.

17 THE COURT: If you did not think it was binding,
18 you would not pursue it, would you?

19 MR. WOLF: Well, hope springs eternal, Judge.

20 THE COURT: I think it would bind them, and that
21 is why I am stating it. I think if you did not think so, it
22 would be more than foolishness to be attempting to litigate
23 it under the kind of a picture that has been described to me.

24 I don't know why you don't just take an appeal
25 from my stay. I invite you to do that.

1 MR. WOLF: I discussed this with Mr. Schaul, and
2 quite candidly he felt, and with all due respect to Mr.
3 Schaul, when he called me from the phone booth subsequent
4 to the colloquy which occurred between you and Mr. Schaul,
5 in the context of our phone conversation I did not realize
6 that he did not know about certain things in the Laird suit.
7 It was only several days later when this occurred to us,
8 and in all honesty I felt, and so did he, that addressing
9 ourselves once again to the Court would be a more appropriate
10 attempt to resolve it.
11

12 THE COURT: You see, I would be delighted to
13 have all of you continue with the foreclosure suit, so long
14 as you don't attempt to litigate in that action the issues
15 of which this Court has jurisdiction in this pending action.
16 And I don't see why you can't do that. It looks to me
17 like what you are trying to do is indirectly undercut the
18 jurisdiction in this action by litigating an issue over
19 there, and then if you resolve it satisfactorily you will
20 come to this Court and say, "Well, the bank is collaterally
21 estopped, or perhaps even under principles of res judicata
22 it is bound by the findings made in this foreclosure suit."
23 And you will assert that, even though there may be no money
24 available for the Republic mortgage, because it stands so far
25 down in the order of priorities.

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2 MR. WOLF: Judge, if you are correct on the
3 jurisdiction issue, then I am wrong. But I take issue with --

4 THE COURT: I will be glad to have you show me
5 that I am wrong, but you have not indicated anything to make
6 me conclude that you are not bringing the controversy forward
7 there solely to bind the bank and not as a purely in rem
8 matter.

9 MR. WOLF: We are defendants. You have got to
10 remember that.

11 THE COURT: You are defendants who are seeking
12 affirmative relief.

13 MR. WOLF: As is Republic.

14 THE COURT: Maybe they should not do it too. I
15 will stay them also.

16 MR. WOLF: Your Honor, frankly I think that it
17 just boils down to a conceptual outlook on jurisdiction, and
18 I think that if you concede that it is jurisdictional -- I
19 think you are right. I view it otherwise, and I think it is
20 as simple as that.

21 THE COURT: I am open to be convinced how you view
22 it.

23 MR. WOLF: I view it otherwise, that section 94
24 is not a jurisdictional statute.

25 THE COURT: Perfectly agreed.

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2 MR. WOLF: I know that. But when you talk about
3 undercutting the jurisdiction and when you talk about the
4 jurisdiction of this court being threatened by some
5 adjudication in New Jersey, I personally, frankly and
6 candidly, don't see where the jurisdiction arises. The
7 jurisdiction is diversity, to give this court jurisdiction
8 to hear this matter in the federal court.

9 THE COURT: Yes, but you brought a case in federal
10 court; it is a case that is here.

11 MR. WOLF: Yes.

12 THE COURT: And once you start a case, after the
13 answer is filed, then that is a case and there is no way to
14 get out of it.

15 MR. WOLF: That is right, sir.

16 THE COURT: The fact that it was transferred from
17 Newark to New York does not enter into these discussions at
18 all.

19 MR. WOLF: That is correct.

20 THE COURT: You can just treat these issues the
21 same as the case was pending still in Newark.

22 MR. WOLF: With one exception. I think that the
23 New Jersey federal court could litigate all the matters that
24 are occurring in the Laird suit.

25 THE COURT: I don't know if they could, because I

1 WC

2 don't know if they would have complete diversity.

3 MR. WOLF: That may be true.

4 THE COURT: It may be that Laird or FMI or --

5 MR. WOLF: I am talking about power.

6 THE COURT: Power is jurisdictional. How about
7 these tax authorities? Aren't they a party to the fore-
8 closure too?

9 MR. WOLF: The tax authorities?

10 THE COURT: Yes. Aren't there tax lien holders?

11 MR. ROSENBERG: May I speak for the State of New
12 Jersey, if your Honor please. As far as I know, we were
13 never made a party to this action.

14 THE COURT: By "this action," you mean the Laird
15 foreclosure action?

16 MR. ROSENBERG: The foreclosure in New Jersey.

17 THE COURT: Isn't it normal in your state to do
18 that?

19 MR. ROSENBERG: It usually is, yes. I was
20 surprised when I saw this particular action, and I only saw
21 it yesterday for the first time, that the State of New Jersey
22 was not mentioned.

23 THE COURT: You see, if there were, it would be
24 impossible for Judge Lacey to have foreclosed the mortgage.

25 MR. FEINBERG Excuse me, may I interrupt for a

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2 moment?

3 THE COURT: Yes.

4 MR. FEINBERG: There is nothing due and owing to
5 the State of New Jersey in the foreclosure itself, since I
6 am the movant in that particular proceeding representing the
7 Laird Associates.

8 THE COURT: All right.

9 MR. FEINBERG: There would be no necessity in
10 making the State of New Jersey. The only taxing authority,
11 if your Honor please, I am sure you may be referring to is
12 the municipality, and there are outstanding tax title liens
13 which have not as yet been foreclosed. Of course, they are
14 paramount to everything.

15 THE COURT: Yes.

16 MR. ROSENBERG: Let me point this out, if I may,
17 your Honor. As a general rule, the State of New Jersey is
18 made a party for the protection in the sale, since our
19 taxes, if any -- corporate, franchise tax, and so forth --
20 may have prominence in this matter.

21 THE COURT: They may be a lien on the res?

22 MR. ROSENBERG: They usually are by law.

23 MR. FEINBERG: That is true.

24 MR. ROSENBERG: And for that reason usually the
25 State of New Jersey is mentioned in general.

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2 THE COURT: All right. Well, I ought to go back
3 to my original concept here. If you could, as far as I am
4 concerned anything that you can do in that foreclosure
5 which is not going to be available as collateral estoppel
6 by judgment or res judicata in this litigation, you can go
7 ahead and do. This Court is perfectly prepared to modify
8 what I think is a rather limited stay, to modify it even
9 further, if you can show me something that the Court could
10 or should do in that area, but not to permit the transitory
11 claims to be litigated indirectly in that foreclosure.

12 All right, who wants to be heard next? We will
13 give the Attorney General prior courtesy if you want to be
14 heard.

15 MR. ROSENBERG: No.

16 MR. FEINBERG: You represent the great sovereign
17 State of New Jersey and I yield to you.

18 MR. ROSENBERG: Go right ahead.

19 MR. FEINBERG: If your Honor please, my point is
20 that, in keeping with what your Honor has said, when you say
21 you desire, you would like to see the foreclosure proceed
22 unhampered, as you referred to in the transcript of
23 January 9, "I would like to see this foreclosure proceed in
24 New Jersey, and I think the interests of Laird Associates
25 are involved in this case and they are not even before me,

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2 and they may be seriously hampered if there is some delay
3 or confusion."

4 This is all we are asking to do. And we are not
5 a party to this litigation. All we are asking to do is to
6 proceed with our action in rem on the foreclosure itself,
7 and the only dispute we would have at the time as far as we
8 are concerned with Republic National Bank is as to the
9 priority of their lien.

10 THE COURT: I see no problem in adjudicating that,
11 and it was not my intention by my order to limit you from --

12 MR. FEINBERG: Yet I was told to the contrary.

13 THE COURT: Who told you that?

14 MR. FEINBERG: Mr. Cooper or Mr. Smith.

15 THE COURT: Well, it makes a difference which,
16 doesn't it?

17 MR. FEINBERG: Yes. He is not here.

18 THE COURT: Did you tell him that, Mr. Cooper?

19 MR. COOPER: No, I didn't.

20 MR. FEINBERG: Maybe Mr. Smith did. I don't
21 remember. One of them.

22 THE COURT: Just clarify for me: Who is Mr.
23 Smith?

24 MR. COOPER: Mr. Smith is our New Jersey counsel.

25 THE COURT: All right.

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2 MR. COOPER: Who acts in the same fashion as
3 these gentlemen act for the other parties.

4 The issue between Laird and the bank, so far as
5 they relate to a determination there as to the validity of
6 the mortgage, which is an issue which may develop out of
7 the foreclosure proceeding in this contest as to who has
8 priority between the Laird mortgage and the bank mortgage,
9 was the one point of restraint with which we are concerned.
10 Laird was not before this Court.

11 But for them to in effect collaterally establish
12 or seek to establish the invalidity of the mortgage, even
13 though they are not Bay Point, would have the same impact as
14 if Bay Point was doing precisely what your Honor has
15 prohibited them from doing.

16 THE COURT: How could that be, Mr. Cooper? Wait
17 just a moment. As the Court understands it, all of the
18 complaints or grievances against the bank which are before
19 me arise out of conduct by either Bay Point or the bank --

20 MR. COOPER: Right.

21 THE COURT: -- after the mortgage was duly recorded
22 by the original mortgagee. It is possible to create equities
23 between a mortgagee and a mortgagor after the lien has been
24 fully recorded and indexed or docketed or whatever they do
25 down there.

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2 If your bank or your predecessor assignor behaved
3 in an equitable fashion with Bay Point, that may give them
4 the cause of action they are pleading here. But I don't see
5 how that affects the priority between Laird and the bank.

6 MR. COOPER: May I go into the facts, although I
7 had hoped to avoid it.

8 THE COURT: If he contends otherwise, I would
9 rather hear counsel for Laird tell me that.

10 MR. COOPER: Fine.

11 MR. FEINBERG: No, I am --

12 THE COURT: Are you trying to assert any claims
13 against the Republic mortgage arising out of anything that
14 occurred after the date of recording?

15 MR. FEINBERG: No, we are talking about what
16 happened prior to the date of recording.

17 THE COURT: Your bank did not even own it then, did
18 you?

19 MR. COOPER: Well, we acquired it simultaneously,
20 the same day, within an hour after the mortgage was granted.

21 THE COURT: All right.

22 MR. COOPER: There was no interval there which
23 they could relate to in attacking the recorded instrument.

24 But I may not have made myself crystal clear or
25 perhaps I have made myself too clear. But the problem as I

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2 see it here is that whoever tries the issue against the
3 bank, which may result in an adjudication affecting the
4 validity of the mortgage between Bay Point and the bank,
5 would be trespassing upon the pending action in this court
6 between Bay Point and Republic on that very issue.

7 We would be bound if the New Jersey court can
8 proceed and by some mischance, a judicial error perhaps,
9 decide that our mortgage had no validity. Because if it
10 has no validity as to Laird, then it has no validity as to
11 Bay Point.

12 THE COURT: As I understand it, Laird could not
13 raise any equities in a mortgage foreclosure which exists
14 between Bay Point and the bank.

15 MR. COOPER: Right.

16 THE COURT: The issue is one of priority of lien,
17 isn't it?

18 MR. COOPER: That is all.

19 MR. FEINBERG: We are talking about priorities.
20 We want to proceed with our foreclosure. And if the court
21 in New Jersey finds that as a matter of fact, as we allege,
22 our mortgage has priority and not pari passu, as they
23 attempted to have us concede in writing, which we refused to
24 do, then I don't see there is any conflict with the juris-
25 diction of this court.

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2 THE COURT: I don't see it either, but just spell
3 it out for me. What is the basis for your claim, the factual
4 or legal basis for your claim, of priority?

5 MR. FEINBERG: The way the mortgages were created,
6 it was understood as far as we are concerned, when our
7 mortgage documents were sent to the settlement, which we did
8 not attend, we were not invited to attend, someone -- I don't
9 want to make any accusations now -- shifted the documents
10 around and recorded their mortgage first prior to our
11 mortgage. We say that was wrong and it was never intended
12 to be done. We want to go back into the very merits of
13 what the loan --

14 THE COURT: I think you ought to tell me who is
15 the someone.

16 MR. FEINBERG: I personally -- my partner -- Mr.
17 Achee was there, and -- were you there, Walter? You weren't
18 there.

19 THE COURT: Was the someone Bay Point or Republic's
20 assignor? Who was it?

21 MR. FEINBERG: I was not there; I don't know all
22 the people who were there.

23 THE COURT: You certainly have to know if you are
24 going to try this.

25 MR. FEINBERG: That is the thing we intend to find

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2 in the discovery, and he refuses to have the discovery.

3 THE COURT: Wait just a moment. The Court has not
4 blocked any discovery.

5 MR. FEINBERG: No, not you. If your Honor please,
6 Mr. Cooper has failed to appear on the last two occasions
7 to have discovery proceedings.

8 MR. COOPER: We were in court on both days. They
9 have noticed me for an examination today, as a matter of
10 fact. I offered to be examined in New York and they have
11 refused. The last time, I was in this court. There is no
12 question here of --

13 THE COURT: I encouraged you to submit to your
14 examination, and I told you don't resist going to New Jersey,
15 your bank did business down there.

16 MR. COOPER: No question about it. Judge, I have
17 no reluctance to go. I will take my measures. But I can't
18 be here and in New Jersey the same day. And both days they
19 fixed on court days.

20 May I go one step further. We, the bank, have
21 totally submitted to examination on every matter. We have
22 given them every piece of paper that we had on this.

23 THE COURT: It seems to me that Laird can
24 adjudicate in the New Jersey court the priority of lien.

25 MR. COOPER: That is right.

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2 THE COURT: And I have never said anything other
3 than that; I have never said anything contrary to that.

4 It was never my intention to enter any order that prevented
5 that. And I have never limited the discovery in either this
6 action or that action since the January 10 hearing.

7 MR. FEINBERG: If your Honor please, I accept
8 that most graciously and I respect it and I believe it. I
9 don't question what the Court is telling me. But, if your
10 Honor please, that is not the image or that is not the
11 picture that we got in New Jersey, in our court in New Jersey.
12 If Judge Wiley were here, he would tell you that.

13 THE COURT: It is all in black and white; it is
14 all on paper.

15 MR. FEINBERG: I agree with you. It was a matter
16 of interpretation of what the words and the verbiage of that
17 order meant. We said what you said. And Judge Wiley is
18 confused, because of the representations made by Mr. Smith
19 the last time we were there in court on February 10.

20 MR. COOLIDGE: May I return to the issue before
21 your Honor for a moment? The order that was prohibited by
22 the injunction is the very order, despite the judge's know-
23 ledge of the order, despite the knowledge by Laird, actual
24 knowledge, and despite the actual knowledge of Bay Point --
25 the precise order which was the basis for my application for

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2 the restraining order was the one which these parties
3 combined in concert to affect.

4 THE COURT: You know, I did not see that. All I
5 saw was misconduct on the part of Bay Point. I did not
6 see anything done by Laird to attempt to oust this court of
7 its jurisdiction.

8 MR. COOPER: If your Honor has before you -- and
9 I assume that counsel for Bay Point has made this available --
10 a transcript of the hearing before Judge Wiley, it will be
11 crystal clear that this was an effort in combination to
12 effect the execution by the judge of an order which your
13 Honor had prohibited.

14 THE COURT: I will read it, but it looks to me as
15 if Laird wanted to get on with his foreclosure.

16 MR. COOPER: May I proceed to the question of fore-
17 closure. We have no objection and have never had any objection
18 to litigating the foreclosure issues in the New Jersey court
19 with any of the parties. But the unfortunate fact is that
20 while Bay Point as plaintiff in this action is restrained
21 from trying elsewhere the issue of validity of our mortgage,
22 the core of the Laird procedure to achieve priority rests
23 entirely on one question, and that is whether or not we hold
24 a valid mortgage.

25 THE COURT: I did not understand that at all, Mr.

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2 Cooper.

3 MR. COOPER: Let him restate it.

4 THE COURT: I just heard Mr. Feinberg tell
5 me that their contention is that their mortgage should
6 have been placed on record first and achieved priority
7 of lien.

8 MR. COOPER: I will consent to that limitation
9 completely.

10 THE COURT: I don't see how he can raise, that is,
11 how Laird can raise the equities which may exist between Bay
12 Point and the bank or the bank's assignors.

13 MR. COOPER: Very good. I am very happy with that.

14 THE COURT: It is nice to have somebody happy.

15 You have been very patient, sir, and you have come
16 a distance. I take it you are down in Trenton?

17 MR. ROSENBERG: Yes, sir. May I say that I, as
18 I told the Court before, heard of this case for the first
19 time -- I said Thursday; it was Wednesday -- and it was at
20 Judge Wiley's request that I appear.

21 Very frankly, in the order the judge was not sure
22 whether you were restraining him, the New Jersey court, from
23 proceeding in the action, and I must admit that this
24 disturbed him quite a bit.

25 THE COURT: The order speaks for itself, but I

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2 think to a limited extent I may have.

3 MR. ROSENBERG: If the Court does not intend to
4 limit Judge Wiley or the court, we would ask for a corrective
5 or amended order.

6 THE COURT: I will have to review that point.
7 What I really intend to do is to protect the jurisdiction
8 of this court. I think I would have to tell you that no
9 one has greater respect for the state judges than I, and it
10 is not my practice to attempt to look over the shoulder of
11 the state judges or second-guess them in any of the work that
12 they do. My relationship with the state bench in this
13 district I regard as excellent and among the best.

14 MR. ROSENBERG: I appreciate that, your Honor.
15 It was just a --

16 THE COURT: What happened here in my view is a
17 manipulation being undertaken in that court to oust this
18 court of the jurisdiction of this case, and the statute
19 does permit, notwithstanding the general provisions against
20 injunctive relief under these circumstances, the statute does
21 permit, indeed it requires, this court to act in aid of its
22 jurisdiction.

23 You know, a busy court, as I am sure Judge Wiley's
24 court is busy, does not always see exactly what is going on
25 when sometimes a pretrial order is proposed, as happened in

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1 this case. What they were trying to do is to litigate
2 first transitory claims, which are involved in this case,
3 which in my view, once decided, would have a res judicata
4 and a collateral estoppel characteristic in this action.
5

6 It is true that this morning Mr. Wolf expresses
7 some doubt -- he does not come out and say that they don't
8 have, and I have asked him on the record here this morning
9 if they would not have, res judicata and collateral estoppel
10 factors -- what would be the purpose of litigating it?
11 Because if you are only litigating it in rem, they are
12 fighting over no money.

13 MR. ROSENBERG: If your Honor please, may I
14 request that an amended order--if you wish I will prepare
15 it -- be entered as far as this restraining order is con-
16 cerned, specifically eliminating Judge Wiley from personal,
17 you might say, restraining and limiting --

18 THE COURT: A restraint is only official; it is
19 certainly not personal.

20 May I ask you all to do this. I know many of you
21 come a distance. I have some other matters which are
22 waiting here this morning. I am about ready to take a
23 recess in any event as far as I attend to those. I would
24 like you all to sit down together for a few minutes and see
25 if you can't address yourselves to this problem in a practical

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1 fashion which will serve everybody's interests. A
2 want to convey to you is that it is not my purpose to per-
3 the subject matter of this litigation to be ousted by any-
4 thing that occurs in New Jersey. It is not my purpose to
5 offend or impede the courts of the sovereign State of New
6 Jersey or any state. It is not my purpose to impede Laird.
7 And I have no difficulty with having the priority of the
8 recordation litigated there or having the property sold
9 subject to these different mortgages, with the surplus money
10 to be apportioned later.
11

12 This instant case that is here before me can be
13 tried as soon as all of you gentlemen would get organized
14 and finish your discovery and come in here and say you are
15 ready to try it. When you try it, you may get down right
16 to the central issues here and resolve all these problems.
17 And they ought to be. The thing has dragged too long.

18 So I ask you in a good professional spirit -- and
19 I am going to particularly ask you, Mr. Rosenberg, since
20 you are a public official -- to take a leading oar in trying
21 to harmonize the discussion.

22 MR. ROSENBERG: I will do that, your Honor, but
23 may I make one other request while I am on my feet?

24 THE COURT: Certainly. I want you to sit down
25 together in the juryroom, and I will come back to you as soon

2 as I can. You may continue, however.

3 MR. ROSENBERG: My second request, your Honor, is
4 based upon the fact that I have never even seen the complaint
5 in the court here. And I would like an opportunity to
6 review that complaint and to submit to your Honor within a
7 week or ten days, as your Honor may order, a brief or memo
8 on the state's position as to --

9 THE COURT: I don't think you will have to do that.
10 Because I think that if all of you will sit down and maintain
11 cordiality you will be able to work out a practical arrangement,
12 and where by consent you can probably get your own needs,
13 your official requirements, satisfied. I am sure you can. And
14 I think the gentleman who represents Laird can go away from
15 here feeling satisfied.

16 MR. FEINBERG: May I beg the Court's indulgence
17 and not to belabor the issue or tax the Court's efforts
18 unnecessarily, but just to refer to what happened on
19 February 10, 1975, before Judge Wiley: When we were asking
20 for discovery proceedings that I referred to previously and
21 Mr. Smith who is New Jersey counsel for Republic National
22 Bank, that Judge Wiley had said ten days, these depositions
23 will be taken in ten days --

24 MR. COOPER: Fifteen.

25 MR. FEINBERG: Just a moment. Mr. Smith said,

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2 "Well, we need at least fifteen days," which meant the
3 outside date was the 25th. And to accommodate them we set
4 it for the 25th, 10 o'clock in the morning, at Mr. Wolf's
5 office. Is that correct, Mr. Wolf?

6 MR. WOLF: Yes.

7 MR. FEINBERG: And then again evasiveness.

8 THE COURT: But I --

9 MR. FEINBERG: Just a moment. And they urged --

10 THE COURT: Please. I don't want to get off on this
11 tangent at this particular moment. I will hear you before
12 I close the record. However, I don't want to get off on it
13 now, because I feel I might jeopardize your efforts to work
14 up something reasonable. But let me say this to you: No stay
15 or injunction or restraint is granted here without a hearing
16 and findings and conclusions. If any of you did not read
17 them, you should have.

18 The order was entered on notice of settlement
19 to Bay Point in our normal practice. If there is anything in
20 the order that does not track what I said from the bench when
21 I granted the restraint, then you are still entitled to go
22 by the findings and conclusions and I will correct the order.
23 I definitely told all these people that the discovery in this
24 case was to proceed and that the discovery in the New Jersey
25 case was in no sense limited.

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So that there was no reason in the world, except possibly having two things to do on the same day, which would prevent that discovery from being completed to Judge Wiley's full satisfaction.

MR. FEINBERG: Thank you, sir.

MR. COOPER: May I, so the record is clear: There has now been a superimposing stay by the Southern District, by this Court, on all of the proceedings in New Jersey arising out of a Chapter XI proceeding in which the first mortgagee, FMI, is involved. It was on the basis of that stay that Judge Wiley adopted the fact that no proceedings could continue, including the discovery proceedings, and he so advised Mr. Smith, who advised me of that fact.

MR. FEINBERG: That is not quite accurate.

MR. COOPER: Now, let us proceed on this.

MR. FEINBERG: No, no.

MR. COOPER: And Judge Wiley has written a letter to the attorneys, to Weil, Gotchal & Manges, who are the attorneys for FMI in the Chapter XI proceedings, inviting their instruction or their interpretation as to the scope of the restraining order issued by the court of this district.

THE COURT: You are talking about the Bankruptcy Court in this district?

MR. COOPER: Yes.

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2 THE COURT: Which bankruptcy judge has it?

3 MR. WOLF: Herzog.

4 MR. COOPER: It is before Asa Herzog. But the
5 order by statute, the filing of the Chapter XI by statute,
6 imposes this stay on all proceedings.7 THE COURT: All of you are experienced attorneys,
8 and you know that the bankruptcy judges in this district will
9 modify that stay on request.10 MR. FEINBERG: That is exactly what Judge Wiley --
11 he wants to see what took place. And I am sure that we can
12 convince him that it would be in no way effective as far as
13 our --14 THE COURT: If you apply to Judge Herzog, I am sure
15 that if you are not taking money away from the bankrupt he
16 will permit the matter to continue.

17 MR. FEINBERG: Right.

18 MR. COOPER: We have no objection to that. But
19 there is an outstanding stay and we respected the stay.20 THE COURT: That should not prevent discovery in
21 this litigation.

22 MR. COOPER: It certainly shouldn't.

23 THE COURT: Judge Herzog will arrange that for any
24 of you.

25 MR. COOPER: One other point, if your Honor please.

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I don't want to be painted here as resisting --

THE COURT: Nobody is painting you --

MR. COOPER: I tell you why.

THE COURT: No, please, do me a favor. Go confer with your adversaries.

MR. COOPER: One other point that I must --

THE COURT: I have other litigants waiting.

MR. COOPER: This will take a second. We have been trying to complete our examination of Bay Point now for several months, and there has been an excuse after an excuse. So that what is good for me should be good for them. We are ready to proceed. They certainly should be.

THE COURT: All right, gentlemen, please take a short recess. The clerk will show you the room which you may use. If you need a telephone, any of you, just tell the clerk.

(Recess)

MR. FEINBERG: With your Honor's permission, I would like to rectify two things for the record, if your Honor please. In fairness to Mr. Cooper, I have learned -- I made a statement previously that he failed to show, refused to appear for the deposition at Mr. Wolf's office on the 25th -- I have since learned in our discussions that Judge Wiley, by virtue of the happening of other events, called off

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2 or nullified that particular order on the late afternoon of
3 the 24th. Therefore, I owe Mr. Cooper an apology, and I so
4 state it on the record, No. 1.

5 MR. COOPER: Thank you.

6 MR. FEINBERG: No. 2, I said I restricted myself
7 unwittingly when I said as far as our proofs are concerned
8 in the state proceeding to the matter of recordation as to
9 whether or not we were entitled to priority as against
10 Republic National Bank. I want to enlarge upon that, if
11 your Honor please.

12 I also want to retain and preserve the position
13 that we are saying that there is no money due and owing
14 on that mortgage to Republic National Bank, either the
15 mortgage itself or under the assignment that they allege they
16 hold, and that they are under an obligation to prove that
17 there is anything owing if there is anything owing to them
18 as to the amount if anything.

19 THE COURT: If you have priority you have no
20 concern with that, do you?

21 MR. FEINBERG: If I have the priority, then I would
22 have no concern.

23 THE COURT: So this is a second line of defense.

24 MR. FEINBERG: Yes. But I want the Court to know --

25 THE COURT: Are the issues or is the claim of

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2 unclean hands or any of these other equitable claims which
3 have been asserted against Republic available to
4 another, sir, in New Jersey? Because, you know, it would
5 not be in New York. Those were personal defenses, if you
6 will. Perhaps your real property law is different over
7 there.

8 MR. FEINBERG: I think it might be in the sense
9 insofar as it affected the priority of our liens, yes.

10 THE COURT: How could that possibly be? Why
11 isn't your priority governed by the recordation laws?

12 MR. FEINBERG: In the normal course of events,
13 whichever lien is recorded first, unless something is said
14 to the contrary within the instrument itself, that would
15 have priority.

16 THE COURT: And the only exception to that would be
17 if the prior recordation of the lien which you assert to be
18 junior was procured by fraud.

19 MR. FEINBERG: As to its priority, yes.

20 THE COURT: As to its recordation time.

21 MR. FEINBERG: As to its recordation.

22 THE COURT: The lawyer was sent to the courthouse
23 and he put the wrong one on first.

24 MR. FEINBERG: That is right.

25 THE COURT: Or perhaps by mistake.

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2 MR. FEINBERG: Mistake or fraud, intentionally or
3 unintentionally. By mistake or intention, yes.

4 THE COURT: But that has nothing to do with the
5 issues between Bay Point and the bank.

6 MR. FEINBERG: No. I am not arguing about that.
7 Except that I also want to show that we allege that there
8 is nothing due to Republic National Bank on that mortgage,
9 which would be tantamount to our saying that if there is
10 nothing due, then we have nothing to fear insofar as our
11 priority is concerned.

12 THE COURT: Nothing due because the bank committed
13 various wrongs against Bay Point which it is suing on here,
14 which Bay Point is suing on here.

15 MR. FEINBERG: I am not sure I am saying it
16 committed against Bay Point. This is one of the purposes of
17 my getting discovery. I have certain suspicions, but I want
18 to know exactly what happened from the persons under oath who
19 were present.

20 THE COURT: You could probably take advantage of a
21 claim of payment, but these are really almost in the sense
22 of personal equitable defenses or counterclaims that they
23 are talking about, and I don't know how a stranger such as
24 Laird gets any benefit from those.

25 MR. FEINBERG: Let us say that is true. That would

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2 be for the courts of New Jersey to determine, would it not,
3 sir?

4 THE COURT: That is the whole argument here, is
5 it not?

6 MR. FEINBERG: Well, may I propound this to the
7 Court: Did not Republic National Bank submit itself to the
8 jurisdiction of the State of New Jersey, the Superior Court,
9 when they answered and filed a counterclaim in our proceed-
10 ings and participate all throughout? We are not a party to
11 the proceedings before this Court. Should we not be able to
12 be permitted to pursue our remedies unencumbered, uninhibited,
13 under those circumstances? I respectfully submit that to
14 this Court.

15 THE COURT: That way of phrasing the question begs
16 the answer, doesn't it? The answer to that question is
17 obviously yes, and if you read the transcript of my January 9
18 hearing I never said otherwise.

19 MR. FEINBERG: This is the point of my argument.

20 THE COURT: What you want to do over there is have
21 a litigation of the transitory claims between Bay Point and
22 the bank.

23 MR. FEINBERG: I don't.

24 THE COURT: Well, don't you?

25 MR. FEINBERG: When I say I don't, I mean I don't

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1 object to it. I don't object to it, no. I say I am not the
2 one that is seeking that, but I don't object to it.
3

4 THE COURT: All right. I think I understand your
5 position. Were you able to work out anything in your
6 conferences?

7 MR. COOPER: We are narrowing the difference
8 between us. Perhaps with your Honor's assistance we can
9 bridge the gap.

10 As between Laird and the bank, that there is no
11 limitation on discovery either way; that there is no restraint
12 on the continuing of the foreclosure action by Laird; that
13 there is no restraint on proving the date of recordation and
14 amount due under the mortgage and assignment, with the
15 limitation already described by your Honor that no adjudication
16 may be sought or made which affects the validity of the
17 mortgage and assignment, the issue before this Court.

18 MR. FEINBERG: I take exception to that. That is
19 not what I said. I think I stated my position, which is
20 completely contrary to what Mr. Cooper is now saying.

21 THE COURT: As I heard your position, there was
22 nothing in the findings and conclusions which I dictated
23 from the bench on January 9 which would inhibit your progress
24 in any way that I could see.

25 MR. FEINBERG: But I just want it understood, if

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2 your Honor please, that I do not --

3 THE COURT: Why don't you all agree that you will
4 make this New Jersey litigation a purely in rem lawsuit and
5 that you will not seek to assert it by estoppel of judgment
6 or by res judicata or by anything else in any other form,
7 and then go right ahead and get this litigation resolved?

8 MR. COOPER: The problem we have --

9 THE COURT: Isn't that a practical position?

10 MR. COOPER: It is a very practical view, and I
11 think that your Honor, by the first stay that was granted here
12 back in 1974, early in 1974, to which we consented, by which
13 after the commencement of the foreclosure action in New
14 Jersey, if your Honor will recall, we consented then to the
15 order, which left to the New Jersey court in the foreclosure
16 action the determination as to the amount due on the
17 indebtedness under the mortgage and assignment if any. We
18 are still prepared to go that far. But the difficulty we
19 have here is that we have some ten different parties involved
20 in the New Jersey lawsuit, including Laird, including FMI,
21 and the others.

22 THE COURT: The only parties that are before me are
23 Bay Point and the bank.

24 MR. COOPER: And Laird.

25 THE COURT: Laird is not before me, except that they

1 WC

2 are here because they would like to intervene and get any
3 ambiguity about this stay resolved.

4 MR. COOPER: Right.

5 THE COURT: And I don't think there is any, although
6 it may well be that the order, which was settled on notice
7 and which the Court assumed was satisfactory as to the form
8 because of the fact that no counterorder was proposed, may
9 not precisely track, however, what I said on January 9.
10 To the extent it does not, I am going to have it modified to
11 reflect precisely what the Court's rulings were and to
12 reflect also any modifications I might make as a result of
13 this motion.

14 Why can't you stipulate, Bay Point and the Republic
15 National Bank of New York, that for purposes of this action
16 no findings or conclusions or judgments or decisions in
17 the Laird foreclosure action or in the bifurcated action
18 or the consolidated action or whatever you want to call
19 these matters which are pending before Judge Wiley will
20 be pleaded or asserted as law of the case or res judicata
21 or collateral estoppel by judgment or claimed preclusion
22 under any theory whatsoever, and just agree to that, and
23 then you obviate all of these many problems.

24 MR. COOPER: Your Honor, all we are seeking is
25 what your Honor has described.

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2 THE COURT: Then why don't you stipulate that?

3 MR. COOPER: The difficulty is that, the fact of
4 stipulation -- if counsel binding on Laird and if counsel
5 binding on Bay Point will stipulate as your Honor has
6 indicated that the ultimate determination -- if I may
7 finish, Judge --

8 THE COURT: Yes.

9 MR. COOPER: -- that the ultimate and binding
10 adjudication on these three parties before you shall rest
11 with this Court as it was initiated as to the validity of
12 the mortgage and assignment; otherwise we are going to have
13 a conflict of law situation which is not resolved.

14 THE COURT: There won't be any conflict of law
15 situation, because the New Jersey proceedings will resolve
16 an in rem issue. The way you have your pleadings set up
17 over there and with the kind of pretrial order which you
18 have over there, it appears to be including both personam
19 claims and rem claims. If you will agree that no decision
20 in that action will be pleaded here as precluding anybody's
21 rights, either the bank or Bay Point -- and this should be
22 in their mutual interests; it is Bay Point who brought this
23 action -- then I see no difficulty, and it would be possible
24 to dissolve the stay and everybody could go litigate to
25 their heart's content in New Jersey, and then they could

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2 try the issues tendered in this case here. And I don't
3 think we are concerned with Laird.

4 The only reason Laird and the Attorney General
5 are here this morning is that they are aggrieved by what
6 they interpret to be the terms of the stay. They are not
7 concerned with the outcome of this particular Southern
8 District litigation in the least way.

9 MR. COOPER: Is your Honor indicating that with
10 respect to the validity of the mortgage and assignment --

11 THE COURT: They can make an in rem decision over
12 there --

13 MR. COOPER: In rem.

14 THE COURT: -- and you can try it de novo and in
15 personam here. That is my view. Because, you see, after
16 they make the in rem decision, what difference does it make?
17 The property will be sold at a judicial sale --

18 MR. COOPER: Shall I tell you what will happen,
19 Judge, as I view it, with all due respect? If the New
20 Jersey court is permitted to proceed with these parties
21 and a determination is made invalidating the bank mortgage,
22 and the foreclosure sale takes place and there is a surplus
23 derived, to which by New Jersey decision-making we are
24 precluded from asserting any claim under our mortgage, we
25 have nothing to come back to this court for, because Bay

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2 Point is then in the posture of moving away from this
3 whole litigation here, they are the mortgagors, and we
4 are left hanging high and dry.

5 Our only chance of preserving our legal position
6 is predicated on the jurisdiction of this court which
7 Bay Point initially invoked. As a practical matter, we
8 would be denuded of any protection against the consequences
9 of the foreclosure suit.

10 What happens if we later get a decision here,
11 assuming that it is litigated and they continue to litigate
12 it, which upholds the validity of the mortgage and assign-
13 ment? To whom do we have recourse? We are out. The
14 distribution has been made of the surplus funds, the
15 resolution of the validity or invalidity of the mortgage
16 and the assignment has been made, and there is no recourse
17 to anybody. It would in effect accomplish for them
18 precisely the objective which they sought to accomplish by
19 proceeding to have this issue of validity of the mortgage
20 and assignment held by the New Jersey court.

21 We seek the protection of this court. We have
22 had the protection of this court. We have had an order
23 issue out of this court. To have all of that nullified by
24 the kind of acquiescence which they will be prepared to
25 give -- and if I were sitting where Mr. Feinberg is sitting

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2 by Mr. Wolf is sitting. I would welcome this kind of
3 stipulation.

4 THE COURT: You are assuming the existence of some
5 surplus money, and perhaps you have the right to make that
6 assumption.

7 MR. COOPER: If there is no surplus money here,
8 Judge, this is an exercise in futility.

9 THE COURT: Yes, indeed.

10 MR. COOPER: Now, that being so, the thing that
11 most encourages us as the bank that there is surplus money
12 has been the zealously of the actions on behalf of Bay
13 Point and of Laird. We don't know. We have no way of
14 knowing.

15 THE COURT: Meaning no offense to any attorney,
16 this is a lawsuit that never should have been brought.

17 MR. COOPER: Of course.

18 THE COURT: So I don't think it is valid to
19 assume that because somebody is resisting the point, it
20 must be important to them.

21 MR. COOPER: We didn't bring it. We were brought
22 into it. They are the ones that invoked the court.

23 Judge, I know that a pragmatic approach is most
24 desirable. We are not going to be too legalistic in
25 relation to the framework of any proposal that comes from

1 WC

2 your Honor. But I cannot surrender on behalf of the bank
3 the position which was created by this court --

4 THE COURT: Why can't there be a foreclosure and
5 sale and see if there is any surplus money? What is wrong
6 with doing that?

7 MR. COOPER: That is fine. I am ready to do
8 that.

9 THE COURT: Are you ready to do that?

10 MR. WOLF: Absolutely not, your Honor. Your Honor
11 has said this a number of times here. I have sat here and
12 listened. But I must rise, your Honor, and say I am not
13 going to stand by and let there be a foreclosure on my
14 client's property. This is not a first mortgagee that has
15 loaned us \$4 million or \$450,000. With all due respect,
16 frankly, your Honor, they represent Laird, who is a broker,
17 who is entitled to 10 percent of the four million five,
18 which of course is the \$450,000, and we say they are not
19 entitled to a cent. We are attacking their mortgage. We
20 have done this in the Laird litigation.

21 It is our hope that Judge Wiley will see our
22 legal position in such a fashion that he will discharge the
23 mortgage. We are not only attacking the mortgage; we are
24 attacking the note, the security for --

25 THE COURT: Why don't you go forward with a trial

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2 with Laird and try it? Can't you make a motion to try it?

3 MR. WOLF: I made a motion to bifurcate, which was
4 denied. Judge, you have to understand that my viewpoint
5 on this thing is that of a person who represents a client
6 who vigorously is attacking the mortgage that was assigned
7 to Republic, this purchase money mortgage, on which he
8 has numerous defenses and opportunities to gain credits and
9 concessions and so forth. It is a very extensively drafted
10 instrument. It is not a simple mortgage and a note.

11 THE COURT: All of those would be available to
12 you in a foreclosure action, wouldn't they? Why on earth
13 are you here?

14 MR. WOLF: Of course, we started this suit in
15 May of 1973 because under that very instrument, in the hands
16 of Republic, they were required without consideration to
17 give us releases. They would not give them to us. This
18 is a matter of absolute fact, never been denied. They
19 say they have reasons they never gave us release, and of
20 course that is what I want to ask Mr. Cooper in his
21 deposition, because the bank personnel say they did not
22 make that decision, Mr. Cooper did -- or at least bank
23 counsel did. I don't want to misquote the gentleman.

24 MR. COOPER: They acted on my advice, and you want
25 me to disclose the basis of my advice in the question put to

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2 me.

3 THE COURT: That is a different issue.

4 MR. WOLF: I don't want to get into that. The
5 simple, plain fact is that I am not going to stand by for
6 a foreclosure and sale, because it is unjust. My client
7 feels he is not obligated to pay.

8 THE COURT: Is there any way you can litigate
9 Laird's mortgage? Can't you get that by stipulation in
10 Judge Wiley's court?

11 MR. WOLF: Judge, I earlier said -- and I am no
12 expert in mortgage foreclosures, I am not an expert in
13 anything, I am a general practitioner, I am hanging in here
14 by my fingertips --

15 THE COURT: When somebody tells you that, sew up
16 your pockets.

17 MR. WOLF: I can tell your Honor is a student in
18 this field.

19 THE COURT: I am not. I try to be practical with
20 problems.

21 MR. WOLF: Well, I frankly think that one point of
22 difference between you and me is that you are looking at the
23 case before the trial, on the briefs, the files. I look
24 at it oppositely. In the end there will be flesh on the
25 bones, and I think that is going to show you the atrocities

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that have been committed in terms of my client. But this is what makes lawsuits and football games.

Judge, I have to say that my knowledge of foreclosures in New Jersey is this: They are in rem. You cannot obtain in personam relief. And earlier this morning I said that it was my understanding that, irrespective of whatever is in the pretrial order or what anybody says, the fact is that if it was a, let us say, defaulting situation, as most foreclosures are. When the papers are sent to the standing master you send the note, you send the mortgage, an affidavit of the amount due, a statement of the liens, the liens are reported on, and a judgment is entered, and then there is a sale and of course priorities are set forth. There is no in personam judgment ever rendered in a foreclosure action.

In fact, I have researched this point for my own purpose in the Laird suit to see if I could sue certain other parties that are not presently parties in this litigation, and I became satisfied that this was not the case, I could not do it, because I could not obtain an in personam judgment in a foreclosure action.

THE COURT: But you can adjudicate in your foreclosure action the issue of whether the mortgage is void for failure of consideration or for want of consideration

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2 or forgery --

3 MR. WOLF: Absolutely. Because we can't lose sight
4 of the fact that a mortgage is security for a debt; we
5 have to find out whether there was a debt, how much the
6 debt was, and so forth. The issue you are addressing your-
7 self to, to make crystal clear, is whether in deciding this
8 issue they can later collaterally estop one of the parties
9 in another litigation or another jurisdiction.

10 Frankly, as I said this morning, and the cases
11 which I cite say this, or at least one or two of them do, that
12 the judge in the second case has to make that decision --
13 in other words, whether in fact he will permit collateral
14 estoppel to be invoked --

15 THE COURT: This is what the dissent in this
16 circuit says in the case of Goldman Sachs v. Edelstein.
17 That is what the dissenting judge said. And I might
18 privately agree with him, but that is not the rule.

19 MR. WOLF: Judge Oakes?

20 THE COURT: Yes, that is Judge Oakes.

21 MR. WOLF: I realize he said that, but I am not
22 relying on his dissent in that case. I am saying that it
23 is obvious that whether in fact you can invoke the collateral
24 estoppel, res judicata, law of the case, or whatever, is
25 up to the second judge.

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2 THE COURT: In this circuit it is up to the Second
3 Circuit. I happen to agree with Judge Oakes, but I think
4 that the threat is there nevertheless, in view of the
5 reported cases, including particularly the Goldman Sachs
6 case.

7 MR. WOLF: Goldman Sachs was a unique-type
8 situation, I think.

9 MR. FEINBERG: They all are.

10 MR. COOPER: The cases you don't like are always
11 unique.

12 THE COURT: What do you suggest? Is there any
13 practical way out of this matter? Are you ready to
14 discontinue the action without prejudice?

15 MR. WOLF: I have to tell you this, and I hope
16 you don't become offended when I say it, and that is --

17 THE COURT: What you should have done is taken an
18 appeal.

19 MR. WOLF: What I am about ready to say is this --

20 THE COURT: You don't offend me. I am trying to
21 encourage practicality.

22 MR. WOLF: Judge, what I have to say is two things,
23 and I told Mr. Cooper and everybody else when we went back
24 in the back room: I am prepared to take the appeal, because
25 I have to get this thing resolved. I feel that it is going

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2 in a direction that is hurting my client, if there is no
3 other reason for it, and I think there is other reason.
4 Secondly, I am not the attorney of record in this case.
5 I don't want to whipsaw you by having Mr. Schaul on one
6 day saying he is not familiar with the Laird case and
7 having me say on another day that I am not familiar with
8 the Bay Point-Republic case.

9 THE COURT: You can say it, but I take it with a
10 grain of salt.

11 MR. WOLF: I have to say, Judge, these two things:
12 One is that at this posture at this moment I have to say
13 to your Honor I intend to take an appeal or at least I
14 intend to suggest to Mr. Schaul this; and secondly, I have
15 to talk with Mr. Schaul, because he is handling this
16 litigation up here in New York, his office has been the
17 counsel of record ever since its inception. And I would be
18 foolish, I think, to make a binding decision today. Mr.
19 Schaul will be back in ten days, and at that time I will do
20 it. I don't know what the appeal time is in this juris-
21 diction. I have been told that it expires tomorrow.

22 THE COURT: I will enlarge that for you.

23 MR. COOPER: I have said I would have no objection.

24 THE COURT: But I think first if I cannot work out
25 something reasonable -- I thought I could; I thought that

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2 your discussions would all lead you to something. I have
3 already indicated to the Attorney General of New Jersey
4 that he might have a few days to read the file and to file
5 a brief. But if you tell me your partner is coming back
6 in ten days, or your attorney who is associated in this
7 matter, I can enlarge the time for all purposes, with the
8 understanding that everything except discovery would be in
9 status quo until we decide the motion. The motion may have
10 merit. There may be a possibility that the Court can
11 modify the stay in some fashion so as to obviate the
12 difficulties and still preserve the jurisdiction here. But
13 I would really think that there is a lot of effort going
14 into resolving questions which are not really germane to the
15 underlying issues between the parties.

16 I think it has to be said also the end result of
17 litigation in New Jersey ought not to be any different than
18 the end result of litigation here. You have to assume
19 that all the courts are doing justice to the best of their
20 ability and that there is adequate remedy by appellate
21 review in each court.

22 So you might be very well advised to just dis-
23 continue this entire matter without prejudice and go in and
24 fight it out before Judge Wiley. You might be very well
25 advised to do that.

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2 MR. COOPER: I can't speak for Bay Point, but I
3 have one suggestion to make that may be consistent with
4 your Honor's objective.

5 Your Honor indicated by the order that you would
6 give preferential treatment to this case. We have been
7 exhaustively examined, and I think counsel have no com-
8 plaint as to the production of all kinds of files and
9 information. The only two witnesses that they still seek
10 to examine are the two attorneys in the case, myself and
11 Mr. Arnold Smith in New Jersey. We have offered to be
12 examined. We will then decide whether, if the question is
13 not appropriate, we will make the appropriate objection to
14 it.

15 I am even prepared and considering seriously
16 not resisting the examination, asking my client to lift the
17 restraint on me, because once this examination is completed
18 and once they have submitted Mr. Achee for Bay Point so
19 I can complete my examination of him, we are ready to go
20 to trial.

21 THE COURT: I have never stayed the depositions.
22 If anyone came in seeking to force a deposition by order
23 to show cause, I would require depositions to proceed.

24 MR. COOPER: This has been a matter of courtesy
25 between counsel. I have been waiting now, it has been about

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2 TWO months, and there has been Mr. Schaul's absence; Mr.
3 Achce unfortunately had a death in the family which covered
4 it, which I can understand; but now we are on the verge
5 where we can really go to trial without any delay. And I
6 am prepared to go to trial.

7 THE COURT: While you are on the subject --

8 MR. COOPER: As soon as these two items are
9 covered. In other words, if this were possible, we could
10 dispose of the issue that is raised before your Honor in
11 advance of when it is likely to ever reach the New Jersey
12 court.

13 Why is that? For one thing, in the New Jersey
14 court they are now confronted with this Chapter XI of FMI,
15 the first mortgagee, who has initiated a mortgage foreclosure
16 and has priority over all of us.

17 THE COURT: I would not put any emphasis on that.
18 I am sure Judge Herzog would permit that stay to be
19 modified.

20 MR. COOPER: Of course he will permit it. But it
21 may have to be conducted by a trustee, under the aegis of
22 a trustee. We don't know what is going to happen under
23 Chapter XI. But it is going to delay the first mortgage
24 proceeding, which may wipe out Bay Point, wipe out Laird,
25 and wipe us out if there is insufficient realized.

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2 But this issue between us and Bay Point can be
3 tried in this court long before the mortgage foreclosure
4 by the first mortgagee reaches fruition.

5 I am for that. If they will give me a day when
6 Mr. Achee will appear --

7 THE COURT: Before you go any further on this,
8 I want to throw one other thought to you. What I do not
9 want to see is someone submitting to discovery and saying,
10 "Well, I plead the Fifth" or "I plead the attorney-client
11 privilege" or "I plead something," in bar of answering it,
12 and then come in three weeks later at the trial and give us
13 a very glib story or even one that isn't so glib. So if
14 you are going to plead it on the deposition, don't come in
15 and expect to try it. You may be able to do it, but I
16 won't look favorably on it.

17 MR. COOPER: Judge, I am prepared to recommend
18 to my client, with some assurance that it will not be
19 gainsaid, that its attorneys, meaning myself and Mr. Smith,
20 will submit to examination and will not invoke the attorney-
21 client privilege -- I need to transmit this to them and
22 get it in writing from them -- and then I will proceed.

23 We have one difficulty. I know they cannot help
24 it, they want me out in New Jersey, we will have to go out
25 to New Jersey to be examined. That is their privilege.

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1 THE COURT: All right.

2
3 MR. COOPER: So that that is no problem. If they
4 will give me a fixed date when I can proceed to complete
5 my examination of Mr. Achee -- he owes me a number of
6 exhibits which they promised to produce -- we are all
7 finished with this.

8 I tell your Honor that before the next several weeks
9 are out we should have completed depositions.

10 I am doing all of this subject to other pressing
11 engagements, but I am prepared to make the sacrifice. I
12 will sit with them at night; I will sit with them whenever
13 they want to.

14 THE COURT: Mr. Feinberg wishes to be heard.

15 MR. FEINBERG: If I may, sir.

16 THE COURT: Yes.

17 MR. FEINBERG: I am sorry if I was overly suggest-
18 ive by standing here. I did not mean to impose myself on
19 the Court unreasonably, except to ask: What is our position
20 in view of what has just transpired in the past few minutes
21 in terms of the repartee between you and counsel? Should
22 we not be permitted to continue our foreclosure?

23 THE COURT: I would suggest that you order the
24 transcript of my directives from the bench on January 9th.
25 I think you might read that over.

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2 MR. FEINBERG: I have that.

3 THE COURT: Do you have all the pages? Because
4 the Court's official copy has a couple of pages missing.

5 MR. FEINBERG: I thought I did.

6 THE COURT: Check the numbering on your pages.
7 If there is any inconsistency between the order which the
8 Court signed and the Court's findings and conclusions
9 under Rule 65 which were stated on the record on the 9th
10 of January, you may all of you treat the order as modified
11 to conform to my precise directions.

12 MR. FEINBERG: Thank you very much.

13 THE COURT: I think those directions give Laird
14 and the Court in New Jersey ample opportunity to litigate
15 the in rem matters between the parties.

16 I must confess that Mr. Wolf does not agree with
17 that, and he has made a persuasive argument this morning,
18 which I am taking under consideration, and I am giving him
19 time to talk with his colleagues and to submit anything
20 further he wants, and of course the Attorney General of New
21 Jersey has the same privilege. But as you presently stand,
22 I do not believe that the Court's January 3 directives make
23 any significant imposition on Laird.

24 MR. FEINBERG: Thank you. Thank you very kindly,
25 sir.

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2 THE COURT: What you can't do is stand in the shoes
3 of Bay Point and try this case.

4 MR. COOPER: Is your Honor indicating that with
5 respect to Laird that they may in their litigation in the
6 New Jersey court try and perhaps secure an adjudication
7 which directly bears on the validity of the mortgage and of
8 the assignment which permits them collaterally to attack
9 our mortgage and assignment as not a party thereto --

10 THE COURT: I don't think they can do that, but I
11 certainly think they can adjudicate any so-called real
12 defenses.

13 MR. COOPER: As between us.

14 THE COURT: On the res.

15 MR. COOPER: As between us.

16 THE COURT: But not these equitable issues. And I
17 think they can litigate the issue of priority of recordation,
18 mistake or fraud in the recording, and there are probably
19 other issues which they can litigate. But I don't think
20 they can litigate the issues tendered to the Court in this
21 case.

22 MR. COOPER: That is all I am asking.

23 THE COURT: All right. They ought to be able to
24 get adequate relief that way.

25 MR. COOPER: That is exactly right.

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2 THE COURT: Particularly if they are right on
3 their priority of lien.

4 MR. COOPER: Right.

5 THE COURT: If they are right on their priority
6 of lien, all the rest of it is immaterial.

7 MR. COOPER: Let me share my problem with your
8 Honor. I am satisfied, and that is what I stated initially.
9 The one issue that I consider beyond the capacity of the
10 state court in New Jersey to resolve has to do with a
11 collateral attack, possibly resulting in an adjudication,
12 involving the validity of the mortgage and assignment.

13 I don't mind on the recordation, I have no
14 objection to it, and I have so stated. I have no objection
15 with respect to the amount due if any. Because if they
16 are not prior to us, that becomes a matter of concern to
17 them. But what they are attempting to do -- and I would
18 like a disclaimer if one exists -- is to predicate their
19 claim that there is nothing due under the mortgage to us,
20 based on the claimed invalidity of the mortgage and assign-
21 ment.

22 It is one thing to say there is no money due to
23 Republic in its direct and fiduciary capacity, because
24 there are setoffs, which is what Bay Point claims. It is
25 another thing to say there is nothing to do to Republic,

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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BAYPOINT CORPORATION,

Plaintiff,

-against-

REPUBLIC NATIONAL BANK,

Defendant.

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:

73 Civ. 2549

April 24, 1975

5:00 p.m.

BEFORE:

HON. CHARLES L. BRIEANT, JR.,

District Judge

APPEARANCE:

PATTERSON BELKNAP & WEBB, ESQS.
Attorneys for Plaintiff

BY: ROBERT SCHAUL, ESQ.

HERMAN E. COOPER, ESQ.
Attorney for Defendant.

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3 THE COURT: This matter is before me today for
4 several purposes, in part for a regular pretrial conference
5 of counsel which I hold from time to time in getting civil
6 cases ready for trial and in part because there are certain
7 motions pending before me, which I don't need to allude
8 to in detail at this moment, at least two of them, and further
9 because there has been a difficulty in that counsel had agreed
10 with Magistrate Schreiber of this Court, to whom it was
11 delegated by the Court to supervise all pretrial discovery
12 with a view towards making this preferred case ready for
13 immediate trial, and they had agreed that the continuation
14 of Mr. Achee's deposition would be held at 10 a.m. this
15 morning, and it appears that Mr. Achee is a principal and
16 an officer of Plaintiff and that Mr. Achee did not appear
17 in accordance with the understanding of counsel and the
18 Court has been advised that there is reason to believe that
19 Mr. Achee is presently either in Europe or in the Middle
20 East in connection with authorization which was granted to
21 him as Chairman of the Board of Directors of some other
22 companies by the Honorable William Lipkin, the Bankruptcy
23 Judge of the District of New Jersey.

24 And nevertheless, although the Court recognizes
25 the importance of the activities which Mr. Achee is said
to be conducting, there was no basis for not honoring the

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2 commitment to be here in accordance with Magistrate
3 Schreiber's directions and the Court has had before it the
4 question of what sanctions, if any, or whether -- should be
5 imposed on Baypoint or whether the complaint should be
6 stricken out for failure to prosecute or what procedures
7 would be equitable under the circumstances, and after hearing
8 some extensive oral argument in relation to those issues,
9 it came to the attention of the Court tha counsel appear
10 willing to make a reasonable accommodation, so that this
11 cause may be determined by judgment to be entered, which
12 would permit the parties to go forward, would permit the
13 New Jersey proceedings involving these parties and Laird
14 Associates to go forward with a mortgage foreclosure which
15 is of economic significance.

16 Do I state it correctly, gentlemen. Is there
17 anything any of you want to add to that?

18 MR. SCHAUL: That's correct, your Honor.

19 THE COURT: Would you please state for the record
20 your understanding as to how this matter is to be disposed
21 of?

22 MR. SCHAUL: Your Honor, the proposal which I
23 made was that this action be voluntarily discontinued and--
24 without prejudice, and we offered to stipulate --

25 MR. COOPER: Just a minute.

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2 THE COURT: Let him finish.

3 MR. SCHAU: We offered to stipulate certain
4 items in connection with that discontinuance.

5 Item number one was that we would stipulate that
6 the mortgage which is the subject of this action, that is,
7 the mortgage from Baypoint to United Berkeley, which
8 subsequently was assigned to Republic National Bank of New
9 York, was validly executed at the time it was signed, was
10 validly delivered, was supported by consideration, was
11 validly signed, was validly reported in New Jersey.

12 Secondly, we stipulate that it has always been
13 the understanding of the officers of -- and the intention
14 of the officers of Baypoint Corporation that the mortgage
15 presently held by Republic National Bank was to be a second
16 mortgage on the premises covered in its description subject
17 only to the lien of a mortgage later placed on in favor of
18 Fidelity Mortgage Investors and that we had always understood
19 it was to be prior in sequence and priority to another
20 mortgage given by Baypoint Corporation to Laird Associates
21 and finally, we also agreed to stipulate that Baypoint
22 Corporation would not at any subsequent time bring any action
23 for damages against Republic National Bank of New York in
24 any forum other than one located within the State of New
25 York.

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2 THE COURT: I didn't understand there was any
3 other than as to the damages.

4 MR. COOPER: First of all, it should be with
5 prejudice. Otherwise it has no significance.

6 Secondly, the --

7 THE COURT: Well, it would be disposed of on the
8 merits and I think use of with prejudice or without prejudice
9 is both awkward and I would suggest to you that our prior
10 discussion was based on the understanding, and I made
11 some pencil notes, that there would be a final judgment
12 entered adjudicating these particular issues on the merits
13 so far as it goes and it is neither with nor without pre-
14 dice.

15 It is a final consequential determination of a
16 lawsuit. Of course, you haven't gotten to what the bank will
17 do yet, but my notes indicate they wouldn't bring any action
18 for damages in any forum and I didn't understand they were
19 planning to bring action for damages in New York.

20 MR. SCHAUL: Your Honor, as we discussed before,
21 that's why I tried to go back through, before the reporter
22 was summoned, before I could get all the way through.

23 Mr. Cooper expressed the concern he did not want
24 to be sued for damages in New Jersey or have any of these
25 extraneous items brought up in foreign forum.

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2 MR. COOPER: Any place. I said the risk is I
3 said the risk that we are being otherwise exposed to is
4 that this action could be brought by other counsel regard-
5 less of your goodwill in any forum, including New Jersey.

6 I didn't have any intention of subjecting our-
7 selves to another lawsuit in this jurisdiction or any other.
8 Otherwise there is no conclusion to this matter. Our pur-
9 pose is to determine the matter as we are now doing and on
10 that condition we would be prepared to withdraw on the
11 merits the counterclaim which now is a barrier to the
12 voluntary discontinuance of this action. I think your Honor's
13 recollection probably coincides with mine.

14 THE COURT: That's my recollection, gentlemen.
15 If I misunderstood it, I would be glad to be enlightened.

16 MR. SCHAUL: I apologize if I didn't make myself
17 clear.

18 THE COURT: It is kind of unreasonable for a
19 fellow who is under the direction of the Magistrate not to
20 be here. This deposition of Mr. Achee was put over at
21 least three times from dates that were agreed to or dates
22 that were directed to be followed by the Magistrate.

23 MR. SCHAUL: Three times put over.

24 THE COURT: Each time at the instance of Mr.
25 Achee, placing himself in a position of one who appears to

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2 have neglected to prosecute. It would certainly be bootless
3 to dismiss the transitory claim for damages here if based
4 on what's taken place he could start tomorrow either across
5 the street in the New York State Court, or in this very
6 Court, to sue the bank again on the transitory claim for
7 damages and I did not understand that that's what was being
8 offered here.

9 I think it would be illusory to enter into any
10 such stipulation. Before I would direct his presence on
11 pain of dismissal and I'll give him a date early next week
12 to be present. But I understood you to say he didn't want to
13 come and that it was his -- it was your efforts to avoid
14 him coming that brought this whole matter over.

15 MR. SCHAUL: No, your Honor, I stood up and said
16 I had made this offer to Mr. Cooper and apparently I
17 expressed it inartfully --

18 THE COURT: I'm afraid you did.

19 MR. SCHAUL: I tried to be certain that I
20 expressed that we would be willing to meet the bank's con-
21 cern that they did not wish to be sued for damages in
22 New Jersey or by other counsel somewhere.

23 MR. COOPER: Or in New York. Any place.

24 MR. SCHAUL: I have not got authority. They
25 have a substantial authority --

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2 THE COURT: I am now making a direction on this
3 record that Mr. Achee will be present in this courthouse,
4 he will report to room 519 at 9:30 on Monday morning and
5 he will submit to his deposition, which will be conducted
6 under my direct supervision and will proceed until conclu-
7 sion and I further tell you that it is my intention, should
8 he not comply fully and fairly with my direction, to make
9 a finding that he has abused the process of this Court,
10 that he has neglected to prosecute this litigation in
11 behalf of Baypoint Corporation, which I regard in some
12 sense as his alter ego, that a reference to the docket
13 sheets here will indicate a neglect and failure to prosecute
14 and that Rule 41B of the Federal Rules of Civil Procedure
15 justifies me and I will do so on Monday morning to dismiss
16 his complaint with prejudice so you kindly get on the
17 telex and you tell him in whatever place he is that the word
18 from the Court is, be there.

19 MR. SCHAUL: Your Honor, could I ask for more
20 time than Monday morning?

21 THE COURT: No, sir. That's adequate time. I
22 have been had, gentlemen. I have been abused by this man
23 and he is just not simply going to do it anymore.

24 MR. SCHAUL: Your Honor, I don't feel Mr. Achee
25 has abused anyone.

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2 THE COURT: I have made my findings and direc-
3 tions and I am waiting to see what will happen Monday morn-
4 ing. That's all, gentlemen.

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BAYPOINT CORPORATION,

Plaintiff,

- v s -

REPUBLIC NATIONAL BANK,

Defendant.

73 Civ. 2549

Before :

HON. CHARLES L. BRIEANT, JR.,

District Judge.

New York, New York
April 28, 1975 - 9:30 a.m.

A p p e a r a n c e s :

PATTERSON, BELLKNAP & WEBB, Esqs.,

Attorneys for Plaintiff;

By: ROBERT SCHAUL, ESQ., of Counsel.

HERMAN E. COOPER, ESQ.,

Attorney for Defendant.

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[Case called.]

MR. COOPER: For the motion.

THE COURT: Where is your adversary, Mr. Cooper?

MR. COOPER: In New Jersey, I suspect.

THE COURT: I suspect so, too.

MR. COOPER: I called him on Friday to discover whether he had communicated with his client, and called him again on Saturday, and was advised that they had reached Mr. Achee in Kuwait, but that they had no way of knowing whether he would or would not appear, and when I was further advised by Mr. Schaul that he would phone me last night in the event that he had any further news. I did not hear from Mr. Schaul.

THE COURT: Well, I get the distinct impression Mr. Schaul would be inclined to dispose of the matter but he can't do it because he can't get authority, and maybe there is also some question about whether his client is in a position even to give authority if he wanted to.

MR. COOPER: Yes.

THE COURT: Now, I am noting the failure of the plaintiff Baypoint Corporation by Mr. Achee to be present in this courtroom at 9:30 on Monday morning, today, to submit to his three-times adjourned deposition as required by my prior order, and I am noting that he is in default.

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2 Now, what is your present application?

3 MR. COOPER: My application is for a motion
4 under Rule 37, Sub-Section (b), Sub-Sub-Section (c), to
5 dismiss for willful failure to comply with the outstanding
6 order of this Court.

7 THE COURT: All right. I will dismiss the
8 complaint on that ground. I am somewhat concerned as to
9 how to proceed with regard to the counterclaim.

10 MR. COOPER: I will be satisfied, if your
11 Honor please, since this motion, I take it, will be dismissed
12 with prejudice.

13 THE COURT: Yes, the complaint herein is dismissed
14 with prejudice for failure to prosecute generally as revealed
15 by the history of this case on the docket sheet of the Court,
16 and there I rely on Section 41(b) of the Federal Rules,
17 Rule 41(b).

18 Here he is, a little bit late, aren't you, Mr.
19 Schaul?

20 MR. SCHAUL: I was caught by an accident.

21 THE COURT: Step up and tell us what the
22 situation is in this matter.

23 MR. SCHAUL: Your Honor, I was speaking with
24 people who spoke to Mr. Achee. I did not speak to him
25 directly. And I am informed that his negotiations for the

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2 borrowing he was directed to proceed with on behalf of
3 C. F. Seabrook and related companies are at such critical
4 phase that were he to withdraw, even for a few days, he
5 might well or at least would run a substantial danger of
6 losing the commitment which he already has for a very
7 substantial borrowing, and he therefore is unable to return.

8 I would like to, if I might --

9 THE COURT: That is most unfortunate.

10 MR. SCHAUL: -- just for the moment, run
11 through the history of Mr. Achee's deposition.

12 THE COURT: I don't want to hear about your
13 history of your deposition. I have enough information and
14 I am dismissing your complaint with prejudice. I am dis-
15 missing the counterclaim without prejudice. I won't impose
16 any costs, but I will not permit any more of the dilatory
17 tactics and the failure to prosecute which we have had in
18 this case.

19 I am founding my determination both on Rule 37
20 and also on Rule 41(b). I think there has been a total
21 failure of prosecution here as far as this Baypoint Corpora-
22 tion is concerned, a failure to cooperate with the directions
23 of the Court, a failure to honor prior commitments, and a
24 failure to cooperate with the Magistrate which has also been
25 reported to me, although I have no documentation of it,

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2 and it is so ordered, based on the transcript here, and I
3 am also vacating the stay which was granted with respect
4 to the New Jersey litigation. So you can go over there
5 and try the issues in the mortgage foreclosure over there.
6 That is all there is to it.

7 MR. COOPER: If your Honor please, I assume
8 that it is for willful failure?

9 THE COURT: Yes, it is willful. It is very
10 discouraging.

11 MR. SCHAUL: If your Honor please, I would like
12 to set forth the facts which I feel would indicate that
13 Baypoint has not failed to prosecute this case.

14 THE COURT: I don't want to hear any more.
15 Tell the Court of Appeals. I have had enough of Baypoint.
16 This Court simply must conduct its docket. We have some
17 eight or nine thousand pending civil cases in this court,
18 and if people behaved as Mr. Achee has done, we would never
19 be able to have any of the cases, and I simply cannot have
20 it, and I am just not going to hear any more. You can go
21 do what you please. I am going to hear the next case.
22 They are ready.

23 MR. COOPER: We have two exhibits that were
24 admitted.

25 THE COURT: They are admitted for purposes of

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2 this hearing which I began on the 24th of April.

3 MR. COOPER: I would assume you would like
4 these for the record?

5 THE COURT: You can keep them. That is all,
6 gentlemen.

7 MR. COOPER: Thank you, your Honor.

8 MR. SCHAUL: Thank you, your Honor.

9 MR. COOPER: Would you prefer that an order be
10 submitted or we take it from the bench?

11 THE COURT: Well, you can take it from the bench.
12 You might need an order to vacate the stay in New Jersey and
13 the Court may make its own order there. I have a proposed
14 form of order from the attorney for Laird, but I am not sure
15 it is satisfactory. I am going to vacate the stay over there.

16 MR. COOPER: No objection.

17 THE COURT: All right, gentlemen, that is all.

18 * * *

UNITED STATES DISTRICT COURT	:	In Bankruptcy No. 75-906
FOR THE DISTRICT OF NEW JERSEY	:	75-907
	:	75-908
In re:	:	75-909
	:	
C. F. SEABROOK COMPANY,	:	
SEABROOK HOUSING CORPORATION,	:	
SEABROOK VILLAGE, INC., and	:	
SEABROOK CONSTRUCTION COMPANY,	:	
	:	
Debtors.	:	

A true copy
W. Lipkin
 Bankruptcy Judge

ORDER AUTHORIZING CHAIRMAN OF
BOARD OF DIRECTORS OF DEBTORS
TO PROCEED WITH REFINANCING
NEGOTIATIONS.

On application by debtors based on the annexed Petition of the President of C. F. Seabrook Company, from which it appears that C. J. Achee is Chairman of the Board of Directors and Vice-President and Assistant Secretary of C. F. Seabrook Company, that Mr. Achee is presently either in Europe or the Middle East in an attempt to conclude negotiations to effect either a refinancing of debtors' secured debt, absent which the interests of the unsecured debtors may be jeopardized, that it is in the best interest of the debtors' estate and the general creditors to authorize and permit Mr. Achee to continue the negotiations for a reasonable period of time, especially since they appear to be near a conclusion, no adverse interest having been represented and no Notice of a hearing on said application need be given, sufficient reason appearing to me therefor;

FILED

APR 22 1975

AT.....O'CLOCK.....M
 WILLIAM LIPKIN
 BANKRUPTCY JUDGE


It is hereby ORDERED that:

1. C. J. Achee be and he is hereby authorized and directed to continue the pending negotiations being conducted at the present time by him, both in Europe and the Middle East.

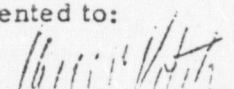
2. Since Mr. Achee is in transit and his itinerary is largely determined by the individuals or firms with whom he is dealing and because there is obviously some degree of confidentiality involved in said negotiations, he shall not be required to give an immediate written report of his activities.

3. Nevertheless, within one week of the date of this Order, he shall give an oral or written report to the Co-Receivers of the status of the negotiations and the contents of this Order shall be brought to his attention at the earliest practicable time.

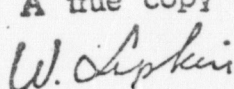
DATED: Camden, New Jersey
April 22nd 1975.


WILLIAM LIPKIN, Bankruptcy Judge

Consented to:


JACK B. KOTOK
Attorney for Co-Receivers

A true copy


W. Lipkin
Bankruptcy Judge

A true copy
W. S. Sphar
Bankruptcy Judge

PETITION

The Petition of Mark H. Watson respectfully shows that:

1. C. J. Achee is Chairman of the Board of Directors, Vice-President, Assistant Secretary and a principal stockholder of C. F. Seabrook Company, debtor.

2. Mr. Achee's background includes longstanding familiarity with real estate development projects in this country and elsewhere and a working knowledge gained from long experience and in his occupation as an accountant previous to this.

3. With this background and in the aforementioned capacity, Mr. Achee is intimately familiar with the fiscal needs and structure of C. F. Seabrook Company. Since the acquisition of the company in 1971, Mr. Achee has actively assisted in guiding the financial affairs of the company.

4. A prime goal of the company has been to refinance a large short term purchase money debt owed to Fidelity Mortgage Investors, Inc. and to restructure the company's financing to fit the longer term programs and projects inherent in the company's land-oriented businesses.

5. On or about March 15, 1975, Mr. Achee went abroad pursuant to the authority vested in him by the Board of Directors of C. F. Seabrook Company to follow up on various foreign money sources contacted by the company. Your Petitioner personally joined Mr. Achee in Zurich, Switzerland on March 17, 1975 in order to meet with and assess the

various persons and firms contacted and to chart out a plan for re-financing which would fit the needs of the said foreign money sources.

6. On March 20, 1975 I returned but since that time Mr. Achee has been continuously negotiating with various persons and firms who are, in my judgment, capable of fulfilling the company's financial requirements. At present, Mr. Achee is in London, England in serious negotiations to these ends.

7. As President of C. F. Seabrook Company, debtors, your Petitioner's opinion is that Mr. Achee is the only person with the knowledge, background and familiarity both with C. F. Seabrook Company and its wholly owned subsidiaries and the sources of re-financing and his continued presence in Europe ^{and the East} is critical to the successful restructuring of the company's finances. It is the debtor's specific objective to incorporate the company's negotiations through Mr. Achee into a plan to be proposed within the Chapter XI proceedings. An abrupt or premature return at this stage by Mr. Achee would severely impair and interrupt the progress which Mr. Achee has made to date and would be detrimental to the best interests of the debtors and their creditors.

WHEREFORE, your Petitioner respectfully requests an Order of the Court permitting and directing Mr. Achee to conclude the presently ongoing negotiations.

Sworn to and subscribed
before me this 22nd day
of April, 1975.

Diana M. Denson

DIANA M. DENSON
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Sept. 14, 1977

Mark H. Watson
MARK H. WATSON

A true copy
W. Lipkin
Bankruptcy Judge

Copies Received 9/2/75

Herman E. Cooper,
Atty for Defendant - Appellee